

# **Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information**

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*Disclose your sources or go to jail. That is the ultimatum being handed down with increased and troubling frequency by courts to journalists across the country. Although many states have enacted statutes that shield reporters from compelled disclosure of sources and information, those statutes offer varying degrees of protection. The result, therefore, is that whether a particular journalist may be forced to reveal a source becomes merely an accident of geography.*

*Adding to this air of uncertainty, the United States Supreme Court recently refused to reexamine the issue of reporter privilege, letting stand a thirty-three-year-old decision that some lower courts interpret as allowing for a qualified reporter privilege and others read as refusing to recognize any sort of privilege at all.*

*After an examination of state reporter shield statutes and federal case law, this Note concludes that the most direct and efficient way to protect journalists from compelled disclosure of sources and information is through federal legislation. Although members of Congress have introduced bills providing a qualified reporter privilege for journalists, this Note calls for the passage of a federal reporter shield law that grants an absolute privilege. This Note proposes a model statute, the Freedom of the Press Act, which would protect journalists in all media and all states against compelled disclosure of sources and information.*

*Without an absolute federal shield in place, journalists may soon see key confidential sources dry up for fear of being unmasked; the media may self-censor to avoid facing subpoenas; reporters who decline to reveal their sources may end up behind bars; and the press may be seriously impeded in its quest to disseminate critical information to the public.*

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## I. INTRODUCTION

At 3:10 p.m. on July 6, 2005, *New York Times* reporter Judith Miller was taken into custody and sent to jail for refusing to disclose the identity of a confidential news source to a grand jury.<sup>1</sup> The grand jury was investigating the illegal leak of covert Central Intelligence Agency (CIA) operative Valerie Plame's identity to several reporters, among them *Time* magazine's Matthew Cooper, who faced the same fate as Miller for his unwillingness to unmask his source.<sup>2</sup> At the last minute, Cooper's source released him from his promise of confidentiality, allowing the reporter to cooperate in the leak investigation and avoid jail time.<sup>3</sup> Miller, on the other hand, remained steadfast in her vow to keep the names of her sources confidential. As three court officers whisked her off to jail, Miller told the judge, "If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press."<sup>4</sup>

A year and a half earlier, a similar scene unfolded in Rhode Island. Minutes after being held in contempt for refusing to divulge a confidential news source, reporter Jim Taricani spoke to the media outside the federal courthouse in Providence. "I never imagined that I would be put on trial and face the prospect of going to jail simply for doing my job,"<sup>5</sup> he told fellow

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<sup>1</sup> Reporters Comm. for Freedom of the Press, *Reporters and Federal Subpoenas*, [http://www.rcfp.org/shields\\_and\\_subpoenas.html#plame](http://www.rcfp.org/shields_and_subpoenas.html#plame) (last visited Feb. 18, 2006). D.C. District Judge Thomas F. Hogan ordered that Miller remain incarcerated for contempt until she decided to divulge her source or until the grand jury term expired in October of 2005. Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

<sup>2</sup> Kelly Rayburn & James Bandler, *Lawyer Argues Reporters Have a Right to Protect Their Sources*, WALL ST. J., Dec. 9, 2004, at B2. For a further discussion of Miller's and Cooper's cases, see *infra* text accompanying notes 115-34.

<sup>3</sup> Adam Liptak, *For Time Reporter, Decision to Testify Came After Frenzied Last-Minute Calls*, N.Y. TIMES, July 11, 2005, at A12. Just before Judge Hogan sentenced Miller and Cooper, Cooper announced, "A short time ago, in somewhat dramatic fashion, I received an express personal release from my source." *Id.* *Time* magazine had already turned over Cooper's notes to Special Prosecutor Patrick Fitzgerald after the United States Supreme Court refused to hear the reporters' case. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 965 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005); see also Adam Liptak, *Prosecutor in Leak Case Calls for Reporters' Jailing*, N.Y. TIMES, July 6, 2005, at A14.

<sup>4</sup> Liptak, *supra* note 1. After eighty-five days in jail, Miller broke her silence, revealing to a grand jury that her source was Vice President Dick Cheney's Chief of Staff, I. Lewis "Scooter" Libby. Don Van Natta Jr. et al., *The Miller Case: A Notebook, A Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1.

<sup>5</sup> Jim Taricani Statement, Nov. 18, 2004, available at <http://www.turnto10.com/news/3930128/detail.html>.

members of the media. The fifty-five-year-old investigative reporter<sup>6</sup> for NBC affiliate WJAR—also a heart transplant recipient—was sentenced to six months of house arrest after being found in contempt for refusing to divulge a confidential news source.<sup>7</sup> “[T]he only reason that [a] prison sentence is not being imposed,” U.S. District Court Judge Ernest C. Torres told Taricani, “is out of concern for your health.”<sup>8</sup>

Judge Torres ordered that Taricani’s confinement conditions mirror those he would have faced if incarcerated: Taricani could not leave his North Kingstown home, except to visit his doctors;<sup>9</sup> he could not access the internet, or appear on radio or television; and he had to abide by restricted visitation hours.<sup>10</sup> Eleven days after sentencing, Taricani announced he would not appeal the sentence, citing health concerns, as well as the physical and emotional toll that the court battle had taken on him and his family.<sup>11</sup>

Miller, Cooper, and Taricani are three reporters among a growing list of journalists being ordered to disclose news sources and information before

<sup>6</sup> The words “reporter” and “journalist” are used interchangeably throughout this Note.

<sup>7</sup> Turnto10.com, *Judge Finds Taricani Guilty of Criminal Contempt; Reporter Faces Up to Six Months in Prison*, Nov. 18, 2005, <http://www.turnto10.com/news/3929582/detail.html>; see also *In re Special Proceedings*, 373 F.3d 37, 47 (1st Cir. 2004) (affirming district court’s decision to grant a motion to compel Taricani to answer questions regarding his confidential source); *In re Special Proceedings*, 291 F. Supp. 2d 44, 60 (D.R.I. 2003) (granting special prosecutor’s motion to compel Taricani to answer questions regarding his confidential source).

<sup>8</sup> Transcript of Sentencing Hearing at 27, *In re Special Proceeding*, C.A. No. 01-47 (D.R.I. Dec. 9, 2004), available at [http://www.rid.uscourts.gov/PDFS/transcripts/12092004\\_1-01MSC0047T\\_Sentencing.pdf](http://www.rid.uscourts.gov/PDFS/transcripts/12092004_1-01MSC0047T_Sentencing.pdf).

<sup>9</sup> Tracy Breton, *Taricani Sentenced to Home Confinement*, PROVIDENCE J.-BULL., Dec. 10, 2004, at A1, available at [http://www.projo.com/trial/content/projo\\_20041210\\_jimt10.2b2628.html](http://www.projo.com/trial/content/projo_20041210_jimt10.2b2628.html).

<sup>10</sup> Transcript of Sentencing Hearing, *supra* note 8, at 29.

<sup>11</sup> Reporters Comm. for Freedom of the Press, *Reporter Will Not Appeal Criminal Contempt Conviction*, Dec. 21, 2004, available at <http://www.rcfp.org/news/2004/1221inresp.html>. Taricani served four of his six months under house arrest, and was freed from home confinement on April 9, 2005, after Judge Torres granted the reporter’s petition for early release. Order Granting Petition for Early Termination of Probation and Home Detention, *In re Special Proceedings*, Misc. No. 01-47-T (D.R.I. Apr. 6, 2005), available at <http://www.projo.com/extra/2004/taricani/20050406-termination.pdf> (noting that Taricani had “fully complied” with the “letter and spirit of the conditions of his home confinement”); see also Tracy Breton, *Judge Shortens Taricani’s Time in Confinement*, PROVIDENCE J.-BULL., Apr. 7, 2005, at A1.

grand juries or in courtrooms.<sup>12</sup> Although thirty-one states and the District of Columbia have reporter shield laws,<sup>13</sup> these statutes create an inconsistent patchwork of protection for journalists who wish to keep promises of confidentiality to their sources. Furthermore, few, if any, of the states with statutory shields protect journalists whose work appears on the internet,

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<sup>12</sup> In addition to subpoenaing Miller and Cooper, Special Prosecutor Patrick Fitzgerald, who is leading the Plame leak investigation, issued subpoenas to *Washington Post* reporters Glenn Kessler and Walter Pincus, and NBC's Tim Russert. Lucy A. Dalglish, *Subpoena Gallery*, NEWS MEDIA & THE LAW, Fall 2004, at 6. CNN commentator and syndicated columnist Robert Novak, who was first to publish Plame's identity in July of 2000, refuses to say whether he has been subpoenaed. *Id.* The list of reporters receiving subpoenas continues: prosecutors subpoenaed four reporters in the trial of New York defense attorney Lynne Stewart, who is accused of defying court orders by publicizing her client's statements. *Id.* One of the reporters testified. Five reporters were held in contempt on August 18, 2004 for refusing to testify as to the identities of their sources in the civil trial of nuclear scientist Wen Ho Lee, who is suing two federal agencies for leaks to the media regarding a governmental espionage investigation. *Id.* The year 2004 is not an anomaly in terms of reporter subpoena numbers—the Reporters Committee for Freedom of the Press polled 2300 news organizations regarding subpoenas in 2001. REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 5 (2003), available at <http://www.rcfp.org/agents/agents.pdf>. The 319 organizations who responded to the survey received a total of 823 subpoenas. *Id.* One broadcaster alone received fifty-three subpoenas. *Id.* at 7.

<sup>13</sup> See CAL. CONST. art. I, § 2(B) (West 2002), ALA. CODE § 12-21-142 (2005); CAL. EVID. CODE § 1070 (West 1995); IND. CODE ANN. §§ 34-46-4-1 to 2 (West 1999); MONT. CODE ANN. §§ 26-1-901 to 03 (2005); NEB. REV. STAT. ANN. §§ 20-144 to 147 (LexisNexis 1999); NEV. REV. STAT. ANN. § 49.275 (Michie 2002); N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1992); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 1994); 42 PA. CONS. STAT. ANN. § 5942 (West 2000) (shield laws offering absolute privilege against compelled disclosure); see also ALASKA STAT. §§ 09.25.300–.390 (Michie 2004); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (2003); ARK. CODE ANN. § 16-85-510 (2005); COLO. REV. STAT. ANN. § 24-72.5-101 to 106 (LexisNexis 2004); DEL. CODE ANN. tit. 10, §§ 4320-26 (1999); FLA. STAT. ANN. § 90.5015 (West 1999); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. ANN. 5/8-901-09 (West 2003); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005); LA. REV. STAT. ANN. §§ 45:1451 to 1459 (West 1999); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2002); MICH. COMP. LAWS ANN. § 767.5A (West 2000); MINN. STAT. ANN. §§ 595.021–025 (West 2000); N.J. STAT. ANN. §§ 2A:84A-21 to 21.9, 2A:84A-29 (West 1994); N.M. STAT. ANN. § 38-6-7 (Michie 2004); N.C. GEN. STAT. § 8-53.11 (2003); N.D. CENT. CODE § 31-01-06.2 (1996); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); OR. REV. STAT. §§ 44.510 to .540 (1983); R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (1997); S.C. CODE ANN. § 19-11-100 (Law Co-op. Supp. 2005); TENN. CODE ANN. § 24-1-208 (2000); D.C. CODE ANN. §§ 16-4701 to 4704 (LexisNexis 2005) (shield laws providing a qualified privilege against compelled disclosure). See *infra* Part V for an analysis of state shield laws.

rather than in print, audio, or videotape.<sup>14</sup> Fifteen of the nineteen states without shield laws on the books have recognized differing degrees of a qualified common law reporter privilege.<sup>15</sup> The remaining four states have failed to offer journalists any statutory or common law protection whatsoever against compelled disclosure.<sup>16</sup>

The inconsistent protection afforded by state laws is further exacerbated by the varying interpretations by courts across the country, both state and federal, of the Supreme Court's sole decision regarding a reporter's right to refuse to disclose confidential sources and information.<sup>17</sup> Although many United States Courts of Appeals had interpreted *Branzburg v. Hayes* to allow for a qualified privilege for journalists,<sup>18</sup> the recent trend has been toward utilizing the thirty-three-year-old case to refuse to recognize a reporter privilege.<sup>19</sup>

This Note argues that the most direct and efficient way to provide a clear, uniform rule regarding journalists' right to keep their sources and information confidential is for Congress to pass a federal reporter shield law providing an absolute privilege for reporters in all media—print, radio, television, and internet—in all judicial and legislative proceedings, including grand jury inquiries, depositions, and testimony in open court. Such a rule would foster the free flow of information from the press to the public, and would encourage people with information about wrongdoing to come forward without the fear of reporters being forced to renege on promises of confidentiality. An absolute privilege would also further judicial efficiency, because courts would not have to determine on a case-by-case basis whether to quash subpoenas seeking reporters' sources and information. The Supreme Court itself invited Congress to enact a federal reporter shield law.<sup>20</sup> Although Congress has repeatedly considered federal shield legislation, it has repeatedly failed to take action on any of the bills proposed.

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<sup>14</sup> Only Illinois, New Jersey, and the District of Columbia have shield laws that appear to protect journalists whose work appears on the internet.

<sup>15</sup> The states with some form of common law reporter privilege are Connecticut, Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

<sup>16</sup> These states are Hawaii, Mississippi, Utah, and Wyoming.

<sup>17</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972). See *infra* Part III for a discussion of the case.

<sup>18</sup> See, e.g., *In re Madden*, 151 F.3d 125, 128–29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993).

<sup>19</sup> See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

<sup>20</sup> *Branzburg*, 408 U.S. at 706.

Action is now long overdue. Congress needs to codify an absolute reporter privilege against compelled disclosure to ensure the press is afforded its constitutionally created freedom, unburdened by the threat of subpoenas, to disseminate information to the public. Part II examines the constitutional origins of the freedom of the press, demonstrating that both the Framers of the Constitution, as well as the states that ratified it, intended to carve out a dual institutional role for the press as both distributors of news and as government watchdogs—a role that is dealt a debilitating blow every time a reporter is forced to disclose sources or information.

Part III analyzes the sole Supreme Court case addressing the issue of reporter privilege—*Branzburg v. Hayes*—a thirty-three-year-old decision in which a plurality of the Court held that no such First Amendment-based privilege exists. Part IV explores the post-*Branzburg* jurisprudential climate, focusing primarily on how the federal circuits have interpreted the case, and on the recent and alarming trend among the lower courts to adhere strictly to the *Branzburg* plurality opinion, thereby denying reporters protection against forced disclosure. Part V takes a closer look at the various state shield laws (and lack thereof) across the country, pointing out their inconsistencies and emphasizing the fact that geography has everything to do with whether a reporter will enjoy protection from governmental subpoenas. Part VI provides an overview of existing federal law governing the reporter's privilege, particularly the federal regulations promulgated to guide Department of Justice officials seeking to subpoena the media, demonstrating why these regulations offer insufficient protection to journalists. The discussion then turns to the numerous failed attempts by Congress since the 1920s to pass a federal shield law. Finally, Part VII analyzes the Freedom of the Press Act of 2006, a proposed federal shield law granting an absolute privilege against compelled disclosure of sources and information, not just to traditional journalists, but to some of their colleagues who employ more “modern” means in disseminating news to the public.

## II. THE PRESS CLAUSE

The First Amendment provides that “Congress shall make no law . . . abridging the freedom . . . of the press.”<sup>21</sup> An examination of these eleven words, known as the “Press Clause,” shows that they are rooted in the Framers’ desire to maintain a free flow of information,<sup>22</sup> as well as concerns

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<sup>21</sup> U.S. CONST. amend. I.

<sup>22</sup> The first official governmental declaration regarding the freedom of the press in this country dates back to colonial times. In 1774, the First Continental Congress approved an Address to the Inhabitants of Quebec, which emphasized the importance of

about the dangers of a government left unchecked<sup>23</sup>—the very concerns of which journalists speak when fighting against compelled disclosure of their sources. Affording reporters a full, unqualified shield against such disclosures would, therefore, serve to carry out the Framers' original intent.

The colonial "press corps" was fighting the same war against compelled disclosure that the reporters of today are waging. During colonial times, Benjamin Franklin's brother, James, published a satirical tabloid entitled the *New England Courant*.<sup>24</sup> In 1722, James and Ben, who served as James' apprentice, found themselves standing before a committee of the Assembly, being ordered to divulge the source of several allegedly libelous articles they had published about the government.<sup>25</sup> After refusing to cough up the name of the articles' author, James Franklin was jailed for one month.<sup>26</sup>

Colonial leaders vociferously defended the press's right to publish pieces critical of the government. The Royal Council accused the *Boston Gazette* of seditious libel for an article it printed in 1768 about the royal governor. The governor called upon the Council's lower house to turn the matter over to a grand jury.<sup>27</sup> The House did quite the contrary. Under the leadership of Sam Adams, the House adopted a resolution stating that "[t]he Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."<sup>28</sup>

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freedom of the press as consisting of "besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them . . ." BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 223 (1971). Cf. LEONARD LEVY, *LEGACY OF SUPPRESSION*, at vii (1960) (arguing that the Framers did not intend freedom of the press and of speech to provide broad, all-encompassing protection).

<sup>23</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527. Blasi notes, "[I]f one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate." *Id.*

<sup>24</sup> Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 233 (1974). The publication contained satirical pieces on religion and politics. *Id.*

<sup>25</sup> *Id.* at 234.

<sup>26</sup> Leslye DeRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 788 (1991). Unlike his older brother James, Ben Franklin was not sent to jail for refusing to reveal the source. The younger Franklin later speculated that he was spared from such punishment because he was James's apprentice and it was therefore assumed that he was required to keep his brother's secrets. Ervin, *supra* note 24, at 234.

<sup>27</sup> Levy, *supra* note 22, at 69; see also David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463 (1983).

<sup>28</sup> Levy, *supra* note 22, at 69. The governor later took his case to the courts, but the grand jury refused to return an indictment. *Id.* at 69–70.

The importance of maintaining a free press was also trumpeted on the state level, with nine of eleven states adopting constitutions during the Revolutionary War that explicitly provided for press liberties.<sup>29</sup> Although the idea of drafting a bill of rights was unanimously rejected by the Constitutional Convention in 1787,<sup>30</sup> many states emphatically supported the passage of a bill of rights providing express protection to the press.<sup>31</sup>

While the record is far from replete with details of the debate surrounding the passage of the First Amendment—and more specifically of the Press Clause—during the First Congress,<sup>32</sup> there is evidence that the Senate considered affording only a qualified freedom of the press. The qualified privilege would have allowed for liberty of the press “in as ample a manner as hath at any time been secured by the common law,” but the proposal was rejected in favor of the current language providing absolute press liberty.<sup>33</sup> The fact that the Framers recognized and rejected limited

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<sup>29</sup> Anderson, *supra* note 27, at 464. Anderson credits Pennsylvania’s constitutional language as laying the framework for the First Amendment’s wording. Pennsylvania’s constitution stated “[t]hat the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.” *Id.* at 465. Justice Potter Stewart noted that these state constitutions, while offering protection to the press, provided no such protection to freedom of speech, thereby demonstrating that the two liberties are separate. Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 633–34 (1975).

<sup>30</sup> Schwartz, *supra* note 22, at 435–36. Charles Pinckney and Elbridge Gerry wanted to include a provision stating “that the liberty of the Press should be inviolably observed.” Their proposal was voted down after Roger Sherman deemed a free press guarantee superfluous, claiming the “power of Congress does not extend to the Press,” and that Congress would not, therefore, be able to infringe on the press’s freedom. *Id.* at 436.

<sup>31</sup> Anderson, *supra* note 27, at 472–74. Among the states debating the inclusion of a press clause were Maryland, New York, North Carolina, Pennsylvania, and Virginia. Virginia became the first state to adopt such a clause: “That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated.” *Id.* at 473. Anderson notes that Virginia’s language is quite close to the language James Madison used when he introduced the Bill of Rights in Congress in 1789. *Id.*

<sup>32</sup> Levy, *supra* note 22, at 221. The only statement on record regarding the press clause came from Madison, who stated that “the liberty of the press is expressly declared to be beyond the reach of this Government.” *Id.* During discussions in the House over the Bill of Rights, the debate centered around other aspects of the First Amendment, but the record shows only that the Press Clause was “agreed to.” Anderson, *supra* note 27, at 479.

<sup>33</sup> Anderson, *supra* note 27, at 480. Anderson notes that:

If the qualifying language had been adopted, the United States might have been a very different place today. A press whose freedom was protected in as ample a



press liberty appears to support the idea that they intended for the Press Clause to grant reporters unqualified, unfettered freedom.

Justice Stewart, whose influential dissent in *Branzburg v. Hayes*<sup>34</sup> has served as a model for several state shield laws,<sup>35</sup> seemed to agree with this interpretation, classifying the Press Clause as a “structural provision of the Constitution.”<sup>36</sup> Stewart therefore viewed the role of the press as that of a “Fourth Estate”<sup>37</sup>—an entity responsible for ensuring the system of checks and balances of the three branches of government was functioning properly.<sup>38</sup> Furthermore, if the Press Clause is not interpreted to supply special protection to journalists separate from that of the First Amendment’s Free Speech Clause, the Press Clause becomes redundant.<sup>39</sup>

If we are to ascribe the Fourth Estate role to the news media, they must be free to investigate, research, and report to their readers, listeners, and

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manner as had been secured by the common law would have been one whose editors could be legitimately imprisoned for criticizing the government.

*Id.*

<sup>34</sup> See *infra* text accompanying notes 92–96 for a discussion of Justice Stewart’s *Branzburg* dissent.

<sup>35</sup> See *infra* Part V for an analysis of state shield laws.

<sup>36</sup> Stewart, *supra* note 29, at 633. The Justice recognized the press as “the only organized private business” to which the Framers granted constitutional protection. *Id.*

<sup>37</sup> As Justice Stewart points out, Thomas Carlyle, in *On Heroes and Hero Worship*, first mentioned the concept of the Fourth Estate, explaining that “there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these times.” Stewart, *supra* note 29, at 634.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 633. Many commentators agree with Justice Stewart that the Constitution allocates a special position to the press, separate from the free speech guarantee granted to all American citizens. See, e.g., Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?* 26 HASTINGS L.J. 639, 639–40 (1975) (echoing Justice Stewart’s views that the Framers did not intend the Speech and Press Clauses to grant redundant freedoms); Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 587 (1979) (agreeing with Justice Stewart that the Press Clause provides “distinct constitutional [press] protection”). But see Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 597 (1979) (finding “unconvincing” Stewart’s argument that the Constitution grants the press special status); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 77, 88–91 (1975) (arguing that the Framers’ definition of free press did not elevate the media to the special status Justice Stewart claims). It is interesting to note that twenty-five years after reflecting on Justice Stewart’s views of the press, Floyd Abrams found himself advocating those views as the lawyer for *New York Times* reporter Judith Miller and *Time* magazine’s Matthew Cooper, the two journalists fighting contempt orders for refusing to divulge their confidential sources. See *infra* text accompanying notes 115–34 for a discussion of Miller’s and Cooper’s cases.

viewers, stories of governmental successes, as well as the potentially sordid details of its shortcomings and scandals. To provide fair and accurate coverage—or in some situations, to learn of a story in the first place—journalists may need to rely on confidential sources—sources who operate clandestinely for fear of reprisal if their identities are exposed. Whether the First Amendment shields reporters from compelled disclosure of these confidential sources was a question the Supreme Court took up in 1972.

### III. *BRANZBURG V. HAYES*: THE SUPREME COURT RULES ON REPORTER PRIVILEGE

The first and only time the Supreme Court has directly addressed the issue of a reporter's privilege, the Court held that requiring journalists to appear and testify before state or federal grand juries does not abridge the First Amendment freedom of the press or freedom of speech.<sup>40</sup> To understand why a federal law codifying an absolute reporter privilege is needed, it is important to examine *Branzburg v. Hayes*, an arguably outdated, rather nebulous decision that disposes at once of three reporters' attempts to find constitutional protection for themselves, their sources, and their information.

#### A. *Branzburg v. Pound*

*Branzburg v. Hayes* is a consolidation of four lower court cases. Two of the cases involve Paul Branzburg, a staff reporter for the *Louisville Courier-Journal*.<sup>41</sup> The first case, *Branzburg v. Pound*, centers around a story Branzburg wrote for the newspaper in 1969.<sup>42</sup> In the report, Branzburg interviewed two Jefferson County, Kentucky residents who demonstrated how marijuana could be converted into hashish.<sup>43</sup> The story also featured a photograph of a pair of hands working with hashish on a laboratory table.<sup>44</sup>

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<sup>40</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

<sup>41</sup> *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971). At the time that the Supreme Court granted certiorari in these cases, Judge John P. Hayes had succeeded Judge J. Miles Pound on the Kentucky Court of Appeals, thus the Supreme Court case was *Branzburg v. Hayes*, rather than *Branzburg v. Pound*.

<sup>42</sup> *Pound*, 461 S.W.2d at 345. The story, entitled "The Hash They Make Isn't to Eat," appeared in the November 15, 1969 edition of the paper. *Id.*

<sup>43</sup> *Id.* at 345–46.

<sup>44</sup> *Branzburg*, 408 U.S. at 667.

Branzburg had promised the two hashmakers that their identities would not be revealed.<sup>45</sup>

Ten days after the article ran, Branzburg was subpoenaed to appear before a grand jury. When asked for the identities of the people he observed synthesizing hashish from marijuana,<sup>46</sup> Branzburg refused to disclose the names of the two men whom he had witnessed making hash.<sup>47</sup> The grand jury issued another subpoena, this time threatening Branzburg with contempt penalties if he continued to refuse to reveal the two drugmakers' identities.<sup>48</sup> The state trial court judge rejected the reporter's contention that Kentucky's reporter shield law,<sup>49</sup> the Kentucky Constitution,<sup>50</sup> or the First Amendment shielded him from answering the grand jury's questions.<sup>51</sup>

Branzburg sought writs of prohibition and mandamus from the Kentucky Court of Appeals.<sup>52</sup> The court denied the writs, construing Kentucky's shield law to protect a journalist from having to disclose the identity of an informant who provided him with information, but not a journalist who simply refused to testify about events and people he had personally observed.<sup>53</sup> Branzburg appealed to the U.S. Supreme Court.

### B. Branzburg v. Meigs

A little over a year later, Branzburg again found himself faced with a grand jury subpoena.<sup>54</sup> This time, the article at the heart of the controversy was one Branzburg wrote for the *Courier-Journal* regarding illegal drug use in Franklin County, Kentucky.<sup>55</sup> Eight days after the story's publication, Branzburg was subpoenaed to provide grand jury testimony regarding possible violations of state drug laws. Branzburg moved to quash the

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<sup>45</sup> *Pound*, 461 S.W.2d at 346.

<sup>46</sup> *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972).

<sup>47</sup> *Branzburg v. Pound*, 461 S.W.2d 345, 346 (Ky. 1970).

<sup>48</sup> *Id.*

<sup>49</sup> KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005).

<sup>50</sup> KY. CONST. §§ 1, 2, 8.

<sup>51</sup> *Branzburg*, 408 U.S. at 668.

<sup>52</sup> *Id.* at 668–69.

<sup>53</sup> *Id.* at 669; *Branzburg v. Pound*, 461 S.W.2d 345, 347–48 (Ky. 1970). Furthermore, the court determined that Branzburg had abandoned his First Amendment argument in a supplemental memorandum, and implicitly rejected the Kentucky constitutional argument. *Branzburg*, 408 U.S. at 669.

<sup>54</sup> *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

<sup>55</sup> *Id.* at 749.

subpoena.<sup>56</sup> The motion was denied. Yet again confronted by contempt proceedings, Branzburg appealed, advancing once more the assertion that he was entitled to keep the information that he gathered confidential based on the First Amendment, Kentucky's reporter shield law, and the state's constitution.<sup>57</sup> Yet again, the appellate court rejected Branzburg's arguments, refusing to quash the subpoena and determining that allowing Branzburg First Amendment-based protection would "represent[] a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment."<sup>58</sup> The Court dismissed Branzburg's concern—that testifying would negatively impact his reporting ability because sources would no longer confide in him for fear of being unmasked—as "so tenuous that it does not . . . present an issue of abridgement of the freedom of the press within the meaning of that term as used in the Constitution of the United States."<sup>59</sup>

### C. *In Re Pappas*

The third of the *Branzburg* cases involved a subpoena issued by a Massachusetts grand jury to reporter-photographer Paul Pappas.<sup>60</sup> Pappas was covering rioting and fires in New Bedford, Massachusetts on July 30, 1970. He managed to get past a barricade to photograph a Black Panther news conference being held outside a boarded-up store where the Panthers were headquartered.<sup>61</sup> Pappas asked and was granted permission to come back to the area that evening.<sup>62</sup> When Pappas returned that night, the Panthers allowed him into their headquarters under the condition that he would not report anything he saw or heard except an anticipated police raid.<sup>63</sup> The raid did not transpire, so Pappas wrote nothing about the evening.<sup>64</sup> Nevertheless, two months later, Pappas was ordered to appear before a grand jury. He appeared, but refused to answer questions about what

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 751.

<sup>59</sup> *Id.*

<sup>60</sup> *In re Pappas*, 266 N.E.2d 297 (Mass. 1971). Pappas worked for a New Bedford, Massachusetts television station. *Id.* at 298.

<sup>61</sup> *Id.* at 298.

<sup>62</sup> *Branzburg v. Hayes*, 408 U.S. 665, 672 (1972).

<sup>63</sup> *Id.* See also *In re Pappas*, 266 N.E.2d at 298.

<sup>64</sup> *In re Pappas*, 266 N.E.2d at 298.

had occurred inside Panther headquarters, claiming a First Amendment privilege to protect confidential sources and their information.<sup>65</sup>

Pappas received a second subpoena, and his motion to quash it was denied by the trial judge, who ruled that the journalist had no constitutional privilege to refrain from disclosing to the grand jury what he had witnessed.<sup>66</sup> The appeals court allowed the trial court's determination to stand, noting that Massachusetts had no reporter shield law, and adhering to the view that a constitutional reporter privilege did not exist.<sup>67</sup> The court also characterized the effect of compelling journalists to disclose confidential sources and information on free dissemination of news as "indirect, theoretical, and uncertain."<sup>68</sup>

#### D. Caldwell v. United States

The only *Branzburg* case in which the appellate court afforded protection to a reporter and his confidential sources and information was *Caldwell v. United States*.<sup>69</sup> Earl Caldwell covered the Black Panthers for the *New York Times*. A grand jury investigating potential criminal conduct by the Panthers issued three subpoenas of varying breadth<sup>70</sup> ordering Caldwell to appear. He refused and was found in contempt.<sup>71</sup>

The Ninth Circuit Court of Appeals reversed the district court's contempt order,<sup>72</sup> recognizing the existence of a qualified reporter privilege.<sup>73</sup> The

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<sup>65</sup> *Branzburg*, 408 U.S. at 672–73.

<sup>66</sup> *Id.* at 673.

<sup>67</sup> *Pappas*, 266 N.E.2d at 299, 302–03.

<sup>68</sup> *Id.* at 302.

<sup>69</sup> *Caldwell v. United States*, 434 F.2d 1081, 1089 (9th Cir. 1970).

<sup>70</sup> *Id.* at 1083–84 n.2. The first subpoena, served on February 2, 1970, ordered Caldwell to appear before the grand jury to testify and to bring with him his notes and tape-recorded Panther interviews. After Caldwell objected to the scope of the subpoena, the grand jury issued a narrower order on March 16, directing Caldwell simply to appear. The district court denied Caldwell's motion to quash both subpoenas, directing the reporter to comply with the March 16 subpoena, subject to a protective order stating that Caldwell was not "required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news . . ." *Id.* at 1082. Caldwell appealed the decision, and the court dismissed the appeal on the ground that the district court's order was not appealable. By the time that the appeal was dismissed, the grand jury's term had expired. A new grand jury then issued the third subpoena, which also contained the protective provisions, on May 22, 1970. Caldwell also refused to comply with the third order, and was found in contempt of court. *Id.* at 1083–84 n.2.

<sup>71</sup> *Branzburg v. Hayes*, 408 U.S. 665, 678 (1972).

<sup>72</sup> *Id.* at 679.

court paid particular attention to the affidavits of several journalists, including Caldwell,<sup>74</sup> finding that the reporters' experiences convincing evidence that compelling reporters to testify before grand juries could cause self-censorship to avoid subpoenas, thereby hindering the dissemination of information to the public.<sup>75</sup> Additionally, the court expressed concerns that forcing journalists to divulge information and sources to grand juries would turn the media into an investigative arm of the government. "To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function."<sup>76</sup> Thus, the court said, absent a "compelling [governmental] need," a reporter could not be compelled to appear before a grand jury.<sup>77</sup> Caldwell's victory in the courts would be short-lived. The government appealed, and the Supreme Court granted the government's petition for writ of certiorari.

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<sup>73</sup> *Caldwell*, 434 F.2d at 1081.

<sup>74</sup> The court included excerpts from Caldwell's affidavit in its opinion. Caldwell explained that having to testify before a grand jury would cause irreparable harm to his relationship with his sources and thus decrease his journalistic effectiveness:

I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months that they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted . . . I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations . . . being turned away because they were not known and trusted by the party leadership.

. . . .

[I]f I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman.

*Id.* at 1087-88 n.7.

<sup>75</sup> *Id.* at 1086.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1089. The court also noted that the secrecy of grand jury proceedings "necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences," thereby jeopardizing reporters' relationships with sources who wish to remain anonymous, possibly causing those sources to dry up, thus negatively affecting the flow of news to the public. *Id.* at 1088.

## E. *Branzburg v. Hayes*: No First Amendment-Based Reporter Privilege

### 1. Justice White's Plurality Opinion

On June 29, 1972, the Supreme Court handed down its *Branzburg* decision, rejecting the notion that the First Amendment shields reporters from having to reveal their confidential sources before a grand jury,<sup>78</sup> overturning the Ninth Circuit's *Caldwell* decision, and affirming the decisions in both *Branzburg* cases and in *In re Pappas*. Although Justice White's plurality opinion<sup>79</sup> recognized that "news gathering is not without its First Amendment protections," and indicated that grand jury subpoenas issued to reporters in bad faith would not be permissible,<sup>80</sup> he found that there is no basis for holding that

the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.<sup>81</sup>

Despite affidavits from numerous news organizations expressing concern that forcing reporters to testify before grand juries would cause sources to dry up, the plurality dismissed this notion, finding that there was insufficient evidence that sources would stop providing reporters with information if reporters were required to appear in grand jury proceedings.<sup>82</sup> Furthermore,

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<sup>78</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

<sup>79</sup> Some commentators view Justice White's opinion as the majority opinion by counting Justice Powell, who wrote a separate concurrence, in the tally to reach a five to four majority. See, e.g., *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993); see also James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 709 (1975) (noting that Justice Powell's concurrence is "the key" to the five to four *Branzburg* decision). Many lower courts, however, consider Justice White's opinion to be a plurality. See, e.g., *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (using "plurality" to refer to Justice White's opinion); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 232 (4th Cir. 1992) (referring to Justice White's opinion as a "four-Justice plurality"); *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 990 n.2 (3d Cir. 1985) (calling *Branzburg* a "plurality decision"). Justice Stewart somewhat jokingly suggested that *Branzburg* was a 4½ to 4½ decision. Stewart, *supra* note 29, at 635.

<sup>80</sup> *Branzburg*, 408 U.S. at 707-08.

<sup>81</sup> *Id.* at 690-91.

<sup>82</sup> See *id.* at 693. "[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior

the plurality noted that law enforcement officials involved in grand jury processes were experienced in dealing with confidential informants, thereby making them well-equipped to deal with reporters' confidential sources as well, and thus reducing the deterrent effect of having reporters testify before grand juries.<sup>83</sup>

Even if the sources were put off by the risk of grand juries subpoenaing reporters, the plurality found that the public interest in prosecuting crimes already committed and deterring such crimes in the future outweighed the interest in potential crimes that might be revealed by confidential sources to reporters at a later date.<sup>84</sup> The plurality also refused to entertain notions of a qualified, rather than absolute, reporter privilege, indicating potential problems with courts being forced to determine when and to whom such a privilege would apply: "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."<sup>85</sup>

Additionally, the plurality noted the existence of federal protection for reporters in the form of the Justice Department's Guidelines for Subpoenas to the News Media.<sup>86</sup> Despite the fact that the plurality was unwilling to protect reporters from compelled disclosure, Justice White explicitly invited both Congress and the states to enact reporter shields if they deemed such laws "necessary and desirable."<sup>87</sup>

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common-law and constitutional rule regarding the testimonial obligations of newsmen." *Id.*

<sup>83</sup> *Id.* at 695. Justice White expressed doubt that "the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his." *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 702-04.

<sup>86</sup> *Branzburg v. Hayes*, 408 U.S. 665, 706-07 (1972); *see also* 28 C.F.R. § 50.10 (2005) (Justice Department's subpoena regulations); *infra* notes 183-97 and accompanying text.

<sup>87</sup> *Branzburg*, 408 U.S. at 706. The Court stated that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* Justice White also suggested that states could enact their own reporter shield laws: "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." *Id.*



## 2. Justice Powell's Concurrence

In a concurrence deemed "enigmatic" by three of the dissenters,<sup>88</sup> Justice Powell wrote separately to underscore the limited scope of the Court's holding, emphasizing that journalists are not completely void of constitutional rights in regard to news gathering or source protection.<sup>89</sup> Powell also reiterated the plurality's statement that subpoenas issued in bad faith to reporters would not be tolerated.<sup>90</sup> Moreover, Powell urged courts to employ a balancing test to strike the "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," and concluded by stating that "the courts will be available" to journalists when "legitimate First Amendment interests require protection."<sup>91</sup>

## 3. Justice Stewart's Dissent: The Need for a Qualified Reporter Privilege

In his dissent, Justice Stewart argued that the Court's holding that a journalist has no right to First Amendment protection against compelled disclosure would both impede the press's news gathering processes and harm, instead of further, the administration of justice.<sup>92</sup> Stewart found that reporters have a constitutional right to a confidential relationship with their sources based on the nation's interest in the free flow of information to the public.<sup>93</sup> Unlike Justice White and the plurality, who characterized as speculative evidence that compelling reporter testimony would cause sources to clam up, Stewart found ample proof that "sources will clearly be deterred from giving information, and reporters will clearly be deterred from

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<sup>88</sup> See *id.* at 725 (Stewart, J., dissenting).

<sup>89</sup> *Id.* at 709 (Powell, J., concurring). Powell's opinion was popular with many reporters, who viewed it as critical in paving the way for recognition of a qualified reporter privilege. First Amendment scholar Lucas A. Powe, Jr. notes that, post-*Branzburg*, Powell became "Sainted Lewis" in journalistic circles. Clay Calvert, *Sifting Through the Wreckage of ABC Reportage: Little Victories, Big Defeats & Unbridled Media Arrogance*, 19 HASTINGS COMM. & ENT. L.J. 795, 801 (1997).

<sup>90</sup> *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring).

<sup>91</sup> *Id.* at 710. Many circuits that have recognized a qualified reporter privilege based on the First Amendment cite the Powell concurrence as the basis for such a privilege. Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2095 (1995).

<sup>92</sup> *Branzburg v. Hayes*, 408 U.S. 665, 725 (Stewart, J., dissenting).

<sup>93</sup> *Id.* at 725-26.

publishing it, because uncertainty about exercise of the power will lead to self-censorship."<sup>94</sup>

To protect reporters and their sources and thus preserve the dissemination of news to the public, Stewart suggested a framework for a qualified reporter privilege, requiring reporters to testify only after three conditions had been met:

[W]hen a reporter is asked to appear before a grand jury and reveal [confidential sources] . . . the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>95</sup>

Reporter shield laws in several states have codified what seem to be Stewart-inspired criteria.<sup>96</sup>

#### *4. Justice Douglas's Dissent: A Call for an Absolute Reporter Privilege*

Justice Douglas argued for an absolute reporter privilege, stating that the only time a journalist should be forced to testify in grand jury proceedings is

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<sup>94</sup> *Id.* at 731.

<sup>95</sup> *Id.* at 743 (citation omitted). The Court rejected Stewart's framework for a qualified privilege because it determined that anything less than an absolute privilege would fail to allay confidential sources' fears of being revealed, it would be difficult to implement, and because it could potentially hamper grand juries from obtaining all necessary evidence. Harvard Law Review Association, *Newsmen's Privilege to Withhold Information from Grand Jury*, 86 HARV. L. REV. 137, 142-43 (1972).

<sup>96</sup> Florida is an example of a state whose shield law mirrors the Stewart criteria. In order for the party issuing the subpoena to overcome the state's qualified reporter privilege, the party must:

make a clear and specific showing that:

- (a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
- (b) The information cannot be obtained from alternative sources; and
- (c) A compelling interest exists for requiring disclosure of the information.

when she is implicated in the crime being investigated.<sup>97</sup> He dismissed the notion of using a balancing test to determine when the reporter privilege should apply, stating that “all of the ‘balancing’ was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, [the Framers] repudiated the timid, watered-down, emasculated versions of the First Amendment” that would provide for only a qualified reporter privilege.<sup>98</sup>

Douglas found that two First Amendment principles were at stake in the *Branzburg* cases: first, the individual’s right to freedom of speech and thus privacy regarding her opinions and beliefs; and second, the need for a “steady, robust, unimpeded, and uncensored flow of opinion and reporting.”<sup>99</sup> Like Justice Stewart, Douglas indicated that compelling reporters to testify before grand juries would both silence potential sources and cause journalists to self-censor in order to avoid subpoenas,<sup>100</sup> but unlike his fellow dissenters, Douglas dismissed the efficacy of a qualified reporter privilege, arguing that such a privilege would ultimately “be twisted and relaxed so as to provide virtually no protection at all.”<sup>101</sup>

Douglas concluded by expressing concern over the repeated imposition of government into the realm of press freedoms, indicating that such encroachments were becoming more and more pervasive. “Those in power,” he wrote, “whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.”<sup>102</sup>

Although the lower courts now had the Supreme Court’s answer to the question of whether reporters were shielded by the First Amendment from

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<sup>97</sup> *Branzburg*, 408 U.S. at 712 (Douglas, J., dissenting).

<sup>98</sup> *Id.* at 713. Douglas is viewed by some commentators as interpreting the First Amendment as carving out a “special investigative role” for the media. *See* Blasi, *supra* note 23, at 597.

<sup>99</sup> *Branzburg*, 408 U.S. at 714–15 (Douglas, J., dissenting).

<sup>100</sup> *Id.* at 721. Justice Douglas explained:

Unless [a reporter] has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter’s main function in American society will be to pass on to the public the press releases which the various departments of government issue.

*Id.* at 722.

<sup>101</sup> *Id.* at 720.

<sup>102</sup> *Id.* at 724–25.

compelled disclosure, they appeared uncertain as to what the Court's answer actually meant.<sup>103</sup>

#### IV. POST-*BRANZBURG V. HAYES*: LOWER COURTS INTERPRET THE CASE

The United States Courts of Appeals initially seemed to interpret *Branzburg* as allowing for a journalistic privilege against compelled disclosure.<sup>104</sup> However, the recent trend among lower courts confronted with reporters' claims of privilege has been toward an expansive view of *Branzburg*, denying the existence of such a privilege, thereby forcing journalists to divulge the requested sources and information or face jail time for contempt.<sup>105</sup> The First, Seventh, and D.C. Circuits have all taken up this issue within the past two years. Thus, their recent case law will be examined to demonstrate why a federal reporter shield law is necessary.

##### A. *The First Circuit: The Jim Taricani Case*

Rejecting WJAR reporter Jim Taricani's argument that the First Amendment protected him from compelled disclosure of news sources, the First Circuit interpreted the *Branzburg* decision, which upheld the power of a grand jury to subpoena reporters, as also applying to a special prosecutor's subpoena powers regarding members of the media.<sup>106</sup> Taricani, an

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<sup>103</sup> See Goodale, *supra* note 79, at 720 (noting that "[m]any of the decisions appear confused and even wrong in their application of *Branzburg*").

<sup>104</sup> See, e.g., *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (recognizing that reporters' sources and materials should be afforded some First Amendment protection, although refusing to apply that qualified privilege in this case); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (recognizing a qualified reporter privilege); *von Bulow v. von Bulow*, 811 F.2d 136, 142, 147 (2d Cir. 1987) (acknowledging a qualified First-Amendment based reporter privilege, though rejecting its application in the present case); *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125, 129–30 (3d Cir. 1998) (recognizing a qualified reporter privilege rooted in the First Amendment, but concluding that appellee was not a journalist and therefore was undeserving of protection); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (interpreting *Branzburg* as creating a qualified journalistic privilege); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977) (finding that there is a qualified reporter privilege).

<sup>105</sup> See *In re Special Proceedings*, 373 F.3d 37, 41 (1st Cir. 2004); *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 586 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 535 (7th Cir. 2003); *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 965 (D.C. Cir. 2005) (all rejecting reporters' arguments that their sources are protected by a First Amendment-based privilege).

<sup>106</sup> *In re Special Proceedings*, 373 F.3d at 44–45.

investigative reporter for WJAR, Providence's NBC affiliate, had received and aired a tape of Providence Mayor Vincent A. Cianci, Jr.'s administrative director taking what appeared to be a cash bribe.<sup>107</sup> At the time Taricani obtained the tape, it was under a protective order while the grand jury investigated the mayor's alleged corruption, so distributing the tape was a potential crime.<sup>108</sup> The court appointed a special prosecutor to investigate the leak of the videotape. The special prosecutor then issued a subpoena, ordering Taricani to appear for a deposition.<sup>109</sup> When Taricani refused to answer questions regarding the source of the video footage, the district court found him in contempt,<sup>110</sup> ordering him to pay one-thousand dollars per day until he revealed his source.<sup>111</sup>

On appeal of the contempt order, the First Circuit defined its examination of reporter subpoenas as requiring "heightened sensitivity to First Amendment concerns and invit[ing] a balancing of considerations."<sup>112</sup> Nevertheless, finding that the special prosecutor had issued the subpoena in good faith and after a reasonable attempt to determine from other sources the identity of the person who leaked the tape, the court upheld the contempt order.<sup>113</sup> Taricani remained steadfast in his refusal to disclose his source, and was later sentenced to six months of house arrest for his silence.<sup>114</sup>

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<sup>107</sup> *Id.* at 40. The tape was of FBI surveillance footage, which depicted the mayor's administrative director, Frank Corrente, taking an envelope allegedly containing cash from an FBI operative. *Id.* WJAR aired the tape as part of Taricani's report on Operation Plunder Dome, an investigation into racketeering and corruption involving Mayor Cianci. WJAR, Special Section on Plunder Dome, <http://www.turnto10.com/plunderdome/index.html> (last visited Mar. 31, 2006).

<sup>108</sup> *In re* Special Proceedings, 373 F.3d at 40–41.

<sup>109</sup> *Id.* at 41. The special prosecutor said that he had interviewed fourteen people and deposed several of them, but was still unable to track down the source who leaked the tape to Taricani. *Id.*

<sup>110</sup> The court held Taricani in contempt, despite the fact that the source who leaked the tape voluntarily came forward. Elizabeth Mehren, *Home Confinement for Journalist: A Judge in Rhode Island Gives a TV Reporter Six Months for Not Giving the Source of a Video*, L.A. TIMES, Dec. 10, 2004, at A22.

<sup>111</sup> *In re* Special Proceedings, 373 F.3d 37, 41 (1st Cir. 2004). Taricani's source, attorney Joseph A. Bevilacqua, Jr., was sentenced to eighteen months in prison for leaking the tape and lying about it under oath. Mike Stanton & W. Zachary Malinowski, *Bevilacqua Gets 18 Months for Leaking Tape*, PROVIDENCE J.-BULL., Sept. 10, 2005, at A1.

<sup>112</sup> *In re* Special Proceedings, 373 F.3d at 45 (internal quotations omitted).

<sup>113</sup> *Id.*

<sup>114</sup> Taricani spent four months under house arrest before Judge Torres granted him early release. Pam Belluck, *Reporter Granted Release from Sentence*, N.Y. TIMES, Apr.

## B. *The D.C. Circuit: The Miller and Cooper Cases*

Perhaps the most highly publicized cases involving governmental efforts to compel media disclosure of sources are the cases of reporters Judith Miller and Matthew Cooper. Both journalists found themselves on the receiving end of subpoenas from a special prosecutor investigating the leak to the media of the name of CIA operative Valerie Plame.<sup>115</sup> Miller, a *New York Times* reporter, never actually published a story on the Plame leak, but was still ordered to testify before a grand jury about confidential conversations she had with a specific White House official and to produce documents pertaining to that conversation.<sup>116</sup> Cooper had written a story for *Time* magazine,<sup>117</sup> and was subpoenaed twice—first to compel his appearance at a deposition to answer questions regarding purported conversations with a particular governmental official,<sup>118</sup> then to force him to produce documents and testify a second time.<sup>119</sup> In both Miller's and Cooper's cases, the United States District Court for the District of Columbia refused to quash the subpoenas, citing *Branzburg v. Hayes* as standing for the proposition that

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7, 2005, at A21. For further details on Taricani's sentencing, see *supra*, notes 5–11 and accompanying text.

<sup>115</sup> See *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 27 (D.D.C. 2004) (refusing to quash subpoenas of both Cooper and NBC Washington Bureau Chief Tim Russert, who was also allegedly leaked Plame's name); *In re Special Counsel Investigation*, 346 F. Supp. 2d 54, 56 (D.D.C. 2004) (refusing to quash the second Cooper subpoena); *In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 19 (D.D.C. 2004) (rejecting Miller's motion to quash the subpoenas). Robert Novak was the first journalist to reveal Plame's identity, disclosing it in his *Chicago Sun-Times* column on July 14, 2003. Novak described Plame as "an agency operative on weapons of mass destruction," explaining that two senior White House officials told him that Plame suggested sending her husband Joseph Wilson to Niger to determine whether Saddam Hussein had purchased uranium from the African nation. Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

<sup>116</sup> *In re Special Counsel Investigation*, 338 F. Supp. 2d at 17. Miller had considered writing an article about Plame, discussing the story with at least one confidential source. *Id.*

<sup>117</sup> The story appeared on *Time* magazine's website as a "web exclusive" on July 17, 2003. Matthew Cooper, et al., *A War on Wilson? Inside the Bush Administration's Feud with the Diplomat Who Poured Cold Water on the Iraq-Uranium Connection*, TIME, July 17, 2003, <http://www.time.com/time/nation/article/0,8599,465270,00.html>.

<sup>118</sup> *In re Special Counsel Investigation*, 332 F. Supp. 2d at 27.

<sup>119</sup> *In re Special Counsel Investigation*, 346 F. Supp. 2d at 54. *Time* was also subpoenaed twice, and refused to comply with the orders therein. *Id.*

reporters have no First Amendment protection against compelled disclosure of their sources and information.<sup>120</sup>

Miller and Cooper appealed to the D.C. Circuit Court of Appeals, where the argument that reporters and their confidential sources deserved First Amendment protection received an equally chilly reception.<sup>121</sup> In a three to zero opinion, the court upheld the district court's decision to hold the reporters in contempt for refusing to divulge their sources.<sup>122</sup> The court emphatically refused to entertain notions of a First Amendment-based safeguard for Miller, Cooper, and their confidential sources, finding the case virtually analogous to *Branzburg v. Hayes*, in which the Supreme Court declined to recognize such a privilege against forced disclosure.<sup>123</sup> "The Highest Court has spoken and never revisited the question," Judge David Sentelle stated in the majority opinion, "[w]ithout doubt, that is the end of the matter."<sup>124</sup>

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<sup>120</sup> *In re Special Counsel Investigation*, 332 F. Supp. 2d at 31; *In re Special Counsel Investigation*, 338 F. Supp. 2d at 19. In Cooper's case, the district court rejected other lower court attempts to carve out a qualified reporter privilege post-*Branzburg*:

Whatever extent lower courts around the country have eroded the periphery of the *Branzburg* opinion, the core of the opinion stands strong. The facts of this case fall entirely within that core—a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection. In the three decades since that opinion was penned, the Supreme Court has chosen not to issue a ruling contradicting that holding. Therefore, neither shall this Court.

*In re Special Counsel Investigation*, 332 F. Supp. 2d at 31. The district court also rejected Cooper's argument that D.C.'s reporter shield law applied, determining that federal law was controlling, and that federal law provided no privilege to journalists. *Id.* at 32.

<sup>121</sup> Douglas McCollam, *Court Reporters*, LEGAL TIMES, Dec. 13, 2004, at 3. When Floyd Abrams, attorney for Miller and Cooper, argued the journalists' case before a three-judge panel of the D.C. Circuit, he was bombarded with questions. Judge David Sentelle "testily" and repeatedly asked Abrams to distinguish the case at bar from *Branzburg v. Hayes*. *Id.* Sentelle, who wrote both the court's opinion and a separate concurrence, concluded that there was no difference between the two cases, deeming the facts of the Miller-Cooper case "materially indistinguishable from" the facts in *Branzburg*. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 968 (D.C. Cir. 2005).

<sup>122</sup> *Id.* at 965.

<sup>123</sup> *Id.* at 970. The court also rejected three other arguments in favor of protecting Miller and Cooper's sources. The reporters failed to convince the panel that (1) an evidentiary privilege protects journalists from compelled disclosure, (2) forcing them to divulge their sources resulted in a violation of Miller and Cooper's due process rights, and (3) that the Special Prosecutor Patrick Fitzgerald did not comply with the Justice Department's regulations governing the issuance of subpoenas to journalists. *Id.* at 968–74.

<sup>124</sup> *Id.* at 970.

Although the court declined to grant constitutional protection to Miller and Cooper, each of the panel's three members wrote a separate concurrence, two judges indicated that reporters and their sources were not completely without protection. Judge Sentelle reiterated the *Branzburg* Court's pronouncement that legislatures rather than courts were more appropriate bodies for creating a reporter privilege,<sup>125</sup> whereas Judge Tatel indicated that the proliferation of state shield laws suggested the existence of a federal common law reporter privilege, although such a privilege did not attach in this case.<sup>126</sup> The outcome of the Miller and Cooper appeals sent a shockwave through the journalistic community, prompting renewed calls for the passage of a federal shield law.<sup>127</sup>

After a failed attempt at appealing their case to the full D.C. appellate court,<sup>128</sup> Miller and Cooper appealed to the United States Supreme Court.<sup>129</sup> On June 27, 2005, the Court summarily denied Miller's and Cooper's petitions for writ of certiorari.<sup>130</sup> Nine days later, Judith Miller was held in contempt of court for declining to reveal her source, and was sent to jail, where she remained for eighty-five days until she decided to testify before

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<sup>125</sup> *Id.* at 981 (Sentelle, J., concurring). After analyzing the varying levels of protection provided by state shield laws, Judge Sentelle concluded the decision to create a reportorial privilege "smack[s] of legislation more than adjudication." *Id.*

<sup>126</sup> *Id.* at 986-87 (Tatel, J., concurring). To determine when the common law privilege would attach in a particular case, Judge Tatel indicated the court should weigh the public's interest in compelling reporters to disclose sources, "measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." *Id.* at 998. Tatel said privilege would not apply in this case because the divulgence of Plame's name was more harmful than it was newsworthy. *Id.* at 1001-02.

<sup>127</sup> See, e.g., Press Release, Reporters Comm. for Freedom of the Press, Reporters Committee Calls for Shield Law Passage in Wake of Today's D.C. Circuit Decision (Feb. 15, 2005), <http://www.rcfp.org/news/releases/20050215-reportersc.html>; Press Release, Radio-Television News Directors Association, Court Decision Underscores Need for Federal Shield Law (Feb. 15, 2005) (on file with author) (urging the passage of a federal reporter shield law in response to the D.C. Circuit's decision in the Miller and Cooper cases).

<sup>128</sup> *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 965 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. 2005); see also Adam Liptak, *Two Reporters Suffer Another Court Setback*, N.Y. TIMES, Apr. 20, 2005, at A16.

<sup>129</sup> *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d at 965, *cert. denied sub nom.* Miller v. United States, 125 S. Ct. 2977 (2005) and Cooper v. United States, 125 S. Ct. 2977 (2005).

<sup>130</sup> *Id.*; see also Adam Liptak, *Court Declines to Rule on Case of Reporters' Refusal to Testify*, N.Y. TIMES, June 28, 2005, at A1; Richard B. Schmitt, *Justices Keep Cell Door Open for 2 Reporters*, L.A. TIMES, June 28, 2005, at A18.



the grand jury.<sup>131</sup> Matthew Cooper narrowly escaped incarceration, deciding at the eleventh hour to comply with the special prosecutor's investigation—a decision that Cooper made after his source released him from his promise of confidentiality.<sup>132</sup> Media outlets across the nation decried the jailing of

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<sup>131</sup> Joe Hagan & Anne Marie Squeo, *In Source Case, One Reporter Will Testify, One Goes to Jail*, WALL ST. J., July 7, 2005, at B1; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1. Miller spent her eighty-five days of incarceration at the Alexandria Detention Center, a maximum security facility in Virginia. Lorne Manly, *Jail Where Reporter is Held: Maximum, Modern Security*, N.Y. TIMES, July 8, 2005, at A18. She was released from jail on September 29, 2005, and testified before the grand jury the following day. Van Natta, *supra* note 4. Miller demanded an explicit, personal waiver from her source, Cheney Chief of Staff I. Lewis "Scooter" Libby, before agreeing to reveal Libby's name to investigators. Katharine Q. Seelye, *Freed Reporter Says She Upheld Principles*, N.Y. TIMES, Oct. 4, 2005, at A20. That personal waiver came in the form of a jailhouse teleconference on September 19 between Miller and Libby with their lawyers listening in on the conversation. Van Natta, *supra* note 4. Libby contends that he released Miller from her pledge to keep his name confidential more than a year before the September 19 conference call, while the Miller camp argues that the earlier release was a coerced, blanket waiver made to all journalists to whom Libby had spoken about Valerie Plame. Adam Liptak, *Phone Call with Source and Deal Led Reporter to Testify, but Questions Remain*, N.Y. TIMES, Oct. 1, 2005, at A12. In an editorial published two days after Miller's release from jail, the *Times* stood behind its reporter's decision to go to jail, rather than to accept a coerced waiver:

When a journalist guarantees confidentiality, it means that he or she is willing to go to jail rather than disclose the source's identity. We also believe it means that the journalist will not try to coerce the source into granting a waiver to that promise—even if her back is against the wall. If Ms. Miller's source had wanted to release her from her promise, he could have held a press conference and identified himself. And obviously, he could have picked up the phone. Ms. Miller believed—and we agree—that it was not her place to try to hound him into telling her that she did not need to keep her promise.

*Judith Miller Leaves Jail*, N.Y. TIMES, Oct. 1, 2005, at A14. Miller also stated that Special Prosecutor Fitzgerald's agreement to narrow the scope of his questioning solely to Miller's conversations with Libby factored into her decision to testify. Adam Liptak, *Phone Call With Source and Deal Led Reporter to Testify, but Questions Remain*, N.Y. TIMES, Oct. 1, 2005, at A12.

<sup>132</sup> Adam Liptak, *For Time Reporter, Decision to Testify Came After Frenzied Last-Minute Calls*, N.Y. TIMES, July 11, 2005, at A12. Cooper's notes revealed that his source was Karl Rove, President George W. Bush's deputy chief of staff and primary political strategist. Mark Silva, *Bush's Offense Goes on Defense: CIA Probe Puts Rove Under a Rare Cloud*, CHI. TRIB., July 14, 2005, at A1; Richard Simon & Richard B. Schmitt, *Democrats Take Aim at Rove in Leak Case*, L.A. TIMES, July 12, 2005, at A1. *Time* had already agreed to comply with a court order mandating that the magazine turn over certain documents to the special prosecutor. Pat Milton, *After High Court's Ruling, Time to Turn Over Notes in Leak Case*, PHILA. INQUIRER, July 1, 2005, at A5. *Time* issued a statement explaining its decision, which came shortly after the Supreme Court refused to

Judith Miller,<sup>133</sup> and newspapers devoted their editorial pages to drumming up support for the passage of a federal reporter shield law.<sup>134</sup> With the Supreme Court's refusal to revisit the issue of a journalistic privilege, legislative action seems to be the only means by which reporters can gain federal protection from compelled disclosure.

### C. *The Seventh Circuit: McKevitt v. Pallasch*

Although the battle against compelled disclosure by the defendant journalists in *McKevitt v. Pallasch*<sup>135</sup> has not been as highly publicized as that of Jim Taricani, Judith Miller, and Matthew Cooper,<sup>136</sup> these journalists' unsuccessful struggle against being forced to divulge information is nevertheless an important example of the erosion of lower courts' willingness to recognize a reporter privilege.

An Illinois federal district court ordered *Chicago Sun-Times* reporters Abdon Pallasch and Robert C. Herguth and *Chicago Tribune* reporter Flynn McRoberts to turn over tapes of conversations with an FBI mole on whom

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hear the Miller and Cooper cases, noting in part that "[o]ur nation lives by the rule of law . . . none of us is above it." Carol D. Leonnig, *Time Will Surrender Reporter's Notes*, WASH. POST, July 1, 2005, at A1.

<sup>133</sup> See, e.g., Kathleen Parker, *Judith Miller Takes the Fall for All of Us*, WILKES-BARRE TIMES LEADER, July 24, 2005, at B2; *Reducing Freedom Isn't Proper Way to Protect It*, MACON TELEGRAPH, July 22, 2005, § a; *Jailing Reporter Only Protects Corruption*, ALBANY TIMES UNION, July 17, 2005, at C4; *Voice of the Free Press: Protect a Free Press*, BURLINGTON FREE PRESS, July 13, 2005, at 8; *A Chilling Effect on Journalistic Inquiry*, ROANOKE TIMES, July 12, 2005, at B8; *Illogical Jailing*, BUCKS COUNTY COURIER TIMES, July 10, 2005, at 14A; *Protecting Sources: Jailing Reporters Puts Handcuffs on Freedom of the Press*, KANSAS CITY STAR, July 10, 2005, at B9; *Miller's Jailing Is Wrong*, DESERET MORNING NEWS, July 8, 2005, at A16; *Journalism in a Jail Cell: If Reporters Aren't Allowed to Report, Then the Press Isn't Free*, FRESNO BEE, July 8, 2005, at B8. But see David Ignatius, *How Judy Miller Has Hurt the Press*, AKRON BEACON J., July 11, 2005, at B2.

<sup>134</sup> See, e.g., Editorial, *Pass Federal Shield Law*, THE OREGONIAN, July 25, 2005, at B6; Editorial, *Pass the Federal Shield Law*, ST. PETERSBURG TIMES, July 24, 2005, at 2P; *Only a Shield Law Can Thaw the Chill*, BOSTON HERALD, July 12, 2005, at 24; Editorial, *Instead of Jail, Give Journalists a Shield*, INDIANAPOLIS STAR, July 8, 2005, at A14. The *New York Times* itself ran more than fifteen editorials about the Miller case, and repeatedly urged Congress to pass a federal reporter shield law. Van Natta, *supra* note 4.

<sup>135</sup> *McKevitt v. Pallasch*, 339 F.3d 530, 535 (7th Cir. 2003).

<sup>136</sup> Nevertheless, journalists across the country recognized the significance of *McKevitt*'s outcome—twenty-six major news organizations and media groups filed an amicus brief, asking the court to protect the reporters' tapes from compelled disclosure. Brief of Amicus Curiae ABC, Inc., et al. in Support of Defendants-Appellants' Petition for Rehearing en Banc, *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (Nos. 03-2753, 03-2754), available at <http://www.silha.umn.edu/McKevittvPallaschbrief.pdf>.

they were writing a book to Michael McKevitt, an accused Real Irish Republican Army (IRA) terrorist.<sup>137</sup> McKevitt said that the recordings would help him in his cross-examination of the mole, a key prosecution witness.<sup>138</sup> The trio appealed the order to the United States Court of Appeals for the Seventh Circuit. Rejecting the reporters' assertion that they were protected by a First Amendment-based privilege against compelled disclosure, Judge Richard Posner questioned the need for any sort of reporter privilege, asking "[W]hy there need to be special criteria [for judicial review of a subpoena] merely because the possessor of the documents or other evidence sought is a journalist."<sup>139</sup> The reporters ultimately complied with the order and handed over the tapes, deciding not to appeal to the Supreme Court. Pallasch explained: "We would rather have this be the law in three states as opposed to all 50."<sup>140</sup> The law in the fifty states, however, is not necessarily any better than the law in the Seventh Circuit when it comes to ensuring that reporters throughout the country are protected from forced disclosure of their sources and information.

## V. STATE SHIELD LAWS

Since Maryland enacted its shield law in 1896,<sup>141</sup> thirty states have followed suit, finding the reporter's privilege sufficiently important to codify. Nevertheless, all state shield laws are not drafted equally. Through an analysis of these laws, it becomes evident that the jumbled assortment of shield statutes offers extremely disparate levels of protection to reporters and their sources. For analytical purposes, the states have been divided into categories: (1) states with no common law or statutory reporter privilege, (2) states with some form of common law privilege, (3) states with qualified reporter shield laws, and (4) states that have codified an absolute privilege for reporters.

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<sup>137</sup> Liam Ford, *Reporters' Tapes Demanded for Alleged Militant's Trial; 3 Vow Appeal, Cite 1st Amendment*, CHI. TRIB., July 3, 2003, at N4.

<sup>138</sup> *McKevitt*, 339 F.3d at 531. The identity of the mole, David Rupert, was not confidential, and as Judge Posner notes, Rupert was not opposed to having the tapes turned over to McKevitt. *Id.* at 532.

<sup>139</sup> *Id.* at 533.

<sup>140</sup> Kirsten Murphy, *U.S. Appeals Court Denies Chicago Reporters' Request for Rehearing*, Reporters Comm. for Freedom of the Press, Oct. 20, 2003, <http://www.rcfp.org/news/2003/1020mckevi.html>.

<sup>141</sup> Ervin, *supra* note 24, at 236.

### A. *No Protection for Reporters*

Four states—Hawaii, Mississippi, Utah, and Wyoming—fail to provide any protection against compelled disclosure of confidential sources and information in any type of judicial proceeding. Hawaii's Supreme Court has held that a reporter has "no constitutional right to refuse to answer questions respecting his source of information,"<sup>142</sup> while Utah has been classified as "probably the worst state in the union" when it comes to protecting journalists from compelled disclosure.<sup>143</sup> Mississippi and Wyoming do not have shield laws on the books, nor do they have any case law directly on point indicating that they recognize any sort of common law reporter privilege.

### B. *Common Law Privilege*

Although they have no reporter shield laws in place, fifteen states recognize common law reporter privileges of varying degrees.<sup>144</sup> Connecticut state courts have adopted the interpretation of the United States Court of Appeals for the Second Circuit that a qualified constitutional reporter privilege exists.<sup>145</sup> The Idaho Supreme Court concluded that its state constitution and the First Amendment provide a limited privilege for reporters who seek to keep their sources confidential,<sup>146</sup> while state courts in Iowa, Kansas, South Dakota, Virginia, and Washington have also identified qualified protections for journalists.<sup>147</sup> New Hampshire's Supreme Court

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<sup>142</sup> *In re Goodfader*, 367 P.2d 472, 480 (Haw. 1961).

<sup>143</sup> See Edward L. Carter, *Reporter's Privilege in Utah*, 18 BYU J. PUB. L. 163, 173-74 (2003).

<sup>144</sup> The fifteen states are Connecticut, Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

<sup>145</sup> See, e.g., *Connecticut State Bd. of Labor Relations v. Fagin*, 370 A.2d 1095, 1097-98 (Conn. Super. Ct. 1976) (acknowledging the Second Circuit's recognition of a "limited constitutional privilege" for journalists with confidential sources). The court found that, at least in civil cases, the public's interest in allowing a reporter to keep her sources secret outweighs public and private interests in reporters' compelled testimony. *Id.* at 1097.

<sup>146</sup> See *In re Contempt of Wright*, 700 P.2d 40, 41 (Idaho 1985) ("We hold there is . . . a qualified privilege under the First Amendment to the United States Constitution and Art. I, § 9 of the Idaho Constitution.").

<sup>147</sup> See, e.g., *Winegard v. Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977) ("Although this court is persuaded there exists a fundamental newsperson privilege we are equally satisfied it is not absolute or unlimited."); see also *State v. Sandstrom*, 581 P.2d 812, 814 (Kan. 1978) ("We believe a newsperson has a limited privilege of confidentiality of

acknowledged a qualified reporter privilege in civil cases based on the state's constitution, although the Court found that such a privilege was "more tenuous" in criminal cases.<sup>148</sup>

Some state courts have not only recognized the existence of a qualified privilege, but have also suggested how courts should go about determining whether that privilege attaches to a reporter's confidential sources and information in particular cases. Maine, Missouri, West Virginia, and Wisconsin state courts have all suggested a balancing approach.<sup>149</sup>

The states with the most limited common law protection appear to be Massachusetts, Texas, and Vermont. Massachusetts case law seems reluctant

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information and identity of news sources, although such does not exist by statute or common law."); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995) ("[W]e decline to adopt an absolute privilege . . . [W]e also decline to hold there is no privilege and thus leave journalists and their sources with no protection. Therefore, we hold that a 'qualified privilege' protects confidential news sources from disclosure under certain circumstances."); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974) ("We believe that . . . a newsman's privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment. Unknown at common law, it is a *privilege* related to the First Amendment and not a First Amendment *right*, absolute, universal, and paramount to all other rights."); *Senear v. Daily Journal-Amer.*, 641 P.2d 1180, 1183 (Wash. 1982) (en banc) ("[W]e believe the injury from failing to establish the privilege would be greater than the benefit to be gained by requiring the testimony in civil litigation.").

<sup>148</sup> See, e.g., *State v. Siel*, 444 A.2d 499, 503 (N.H. 1982). The Court found that the limited privilege in civil cases derived from New Hampshire's Constitution, part I, article 22. *Id.*

<sup>149</sup> See, e.g., *In re Letellier*, 578 A.2d 722, 726 (Me. 1990) ("The First Amendment . . . requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct."). A Missouri appellate court adopted a balancing test that examines four factors, much like those suggested in Justice Stewart's *Branzburg* dissent, in determining whether a reporter may be compelled to reveal her confidential sources: "(1) whether the movant has exhausted alternative sources of the information; (2) the importance of protecting confidentiality in the circumstances of the case; (3) whether the information sought is crucial to plaintiff's case; and (4) whether plaintiff has made a prima facie case of defamation." *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997). To overcome a reporter's privilege to refuse to reveal her confidential sources or information, the West Virginia Supreme Court requires the party seeking disclosure to, by a "clear and specific showing," demonstrate that "the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *State ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5, 10 (W.Va. 1997). Wisconsin's Supreme Court "requires a balancing of the factors supporting the non-disclosure privilege against the societal values favoring disclosure." See, e.g., *Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367, 371-72 (Wis. 1983).

to afford reporters protection against compelled disclosure,<sup>150</sup> while at least one Texas appellate court has recognized some form of qualified reporter privilege,<sup>151</sup> although a more recent case denies such protection in criminal proceedings.<sup>152</sup> The extent of Vermont's protection for reporters seeking to shield their sources is rather unclear.<sup>153</sup>

### C. *Qualified Privilege*

The vast majority of states with shield laws offer only qualified protection to journalists.<sup>154</sup> The extent of the codified privilege varies dramatically across the states. Some shield laws provide limited protections solely to reporters' sources, allowing for no explicit privilege regarding unpublished or confidential information.<sup>155</sup> Other states shield a reporter only from compelled disclosure of information.<sup>156</sup> Still others offer qualified protection to both sources and information.<sup>157</sup>

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<sup>150</sup> See, e.g., *In re Promulgation of Rules Regarding Protection of Confidential News Sources*, 479 N.E.2d 154, 156, 157 (Mass. 1985) (declining to establish a right to a reporter's privilege, based in part on the fact that the state legislature is divided on the issue and has failed to pass any of several proposed reporter shield laws).

<sup>151</sup> See *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 678 (Tex. App. 1991) (grounding the finding of a qualified reporter privilege in both the Texas Constitution, art. I, § 8, and in the Free Speech and Press Clauses).

<sup>152</sup> See *State ex rel. Healey v. McMeans*, 884 S.W.2d 772, 775 (Tex. Crim. App. 1994) ("[N]ewsmen have no constitutional privilege, qualified or otherwise, to withhold evidence relevant to a pending criminal prosecution.").

<sup>153</sup> There is little case law regarding the reporter's privilege in Vermont. However, the Vermont Supreme Court has determined that there is a qualified privilege regarding reporters' refusal to answer questions at a deposition in a criminal trial. See *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974).

<sup>154</sup> The states that have codified a qualified reporter privilege are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, and Tennessee. The District of Columbia has also enacted a law providing for a qualified journalist's privilege.

<sup>155</sup> See, e.g., ARK. CODE ANN. § 16-85-510 (2005); 735 ILL. COMP. STAT. ANN. 5/8-901 (West 2003); R.I. GEN. LAWS § 9-1-19.1-2 (1997).

<sup>156</sup> See, e.g., COLO. REV. STAT. ANN. §§ 13-19-119, 13-19-10 (LexisNexis 2004); GA. CODE ANN. § 24-9-30 (1995); N.C. GEN. STAT. § 8-53.11(3)(B) (2003); S.C. CODE ANN. § 19-11-100 (Law Co-op. Supp. 2005).

<sup>157</sup> See, e.g., DEL. CODE ANN. tit. 10, § 4322 (1999); FLA. STAT. ANN. § 90.5015(2) (West 1999); LA. REV. STAT. ANN. § 45:1452 (West 1999); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2002); MICH. COMP. LAWS ANN. § 767.5A (West 2000); MINN. STAT. ANN. § 595.023 (West 2000); N.J. STAT. ANN. § 2A:84A-21 (West 1994); N.M. STAT. ANN. § 38-6-7 (Michie 2004); N.D. CENT. CODE § 31-01-06.2 (1996); OKLA. STAT. ANN.

The reporter privilege in some states is quite weak and thus easy for parties seeking journalistic disclosure to overcome. For instance, in New Mexico, a reporter loses the right to keep her sources or information confidential if "disclosure [is] essential to prevent injustice."<sup>158</sup> North Dakota has a similar standard, requiring disclosure if protecting the reporter from divulging a source would "cause a miscarriage of justice."<sup>159</sup> Louisiana requires a reporter to testify as to confidential sources if "the disclosure is essential to the public interest."<sup>160</sup> Alaska's conditional shield law mandates that reporters disclose sources if withholding such information would either "result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege" or "be contrary to the public interest."<sup>161</sup>

Many states with qualified shield laws require the party requesting the reporter's confidential information to meet specified criteria before the reporter may be compelled to make disclosure. In most cases, the criteria are quite similar to those suggested in Justice Stewart's *Branzburg* dissent.<sup>162</sup> For example, to overcome the reporter privilege in Colorado, the party seeking reporter disclosure must establish, by a preponderance of the evidence:

(a) That the news information is directly relevant to a substantial issue involved in the proceeding;

(b) That the news information cannot be obtained by any other reasonable means; and

(c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.<sup>163</sup>

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tit. 12, § 2506 (West 1993); OR. REV. STAT. § 44.520 (1983); TENN. CODE ANN. § 24-1-208 (2000); D.C. CODE ANN. § 16-4702 (LexisNexis 2005).

<sup>158</sup> N.M. STAT. ANN. § 38-6-7(A) (Michie 2004).

<sup>159</sup> N.D. CENT. CODE § 31-01-06.2 (1996).

<sup>160</sup> LA. REV. STAT. ANN. § 45:1453 (West 1999). Even though its qualified privilege regarding confidential sources appears easy to overcome, Louisiana also provides conditional protection to reporters seeking to prevent disclosure of unpublished (or unaired) information. See LA. REV. STAT. ANN. § 45:1459(B) (West 1999).

<sup>161</sup> ALASKA STAT. § 09.25.310(b) (Michie 2004).

<sup>162</sup> See *supra* text accompanying footnotes 92–96 for a discussion of Justice Stewart's dissent in *Branzburg v. Hayes*, 408 U.S. 365 (1972).

<sup>163</sup> COLO. REV. STAT. ANN. § 13-90-119 (LexisNexis 2004). Colorado's statute also excludes from its protection information reporters have obtained from press conferences, information that has been published or broadcast, a journalist's personal observations of

Other states require "clear and convincing"<sup>164</sup> or "clear and specific"<sup>165</sup> evidence that certain criteria have been met before a journalist may be compelled to divulge sources or information. North Carolina uses a "greater weight of the evidence" standard.<sup>166</sup> Instead of specific criteria, some states simply call for balancing tests in which courts must weigh the public's interest in the information or source sought against societal concerns regarding freedom of the press.<sup>167</sup>

The states with the least qualified (and thus closest to providing an absolute privilege) shield laws contain only limited exceptions to the reporter privilege. Both Arizona's and the District of Columbia's shield laws provide absolute protection as to confidential sources, but qualified protection regarding information.<sup>168</sup> In Arkansas, a reporter can only be compelled to disclose a source if the article or radio broadcast in question<sup>169</sup> was "written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare."<sup>170</sup> Michigan provides an absolute privilege to reporters with the exception of requests for sources or unpublished information in connection with a crime that carries a life sentence and "it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted."<sup>171</sup> Oregon's shield law is all but absolute, providing reporters with full protection, unless there is probable cause that the reporter being subpoenaed has committed, is committing, or is about to commit, a crime.<sup>172</sup>

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crimes if no other sources are "reasonably" available, and any journalist's personal observations of certain felonies. COLO. REV. STAT. ANN. § 24-72.5-103 (LexisNexis 2004). New Jersey also uses the "preponderance of the evidence" standard in connection with overcoming the reporter privilege. *See* N.J. STAT. ANN. § 2A:84A-21.3(b) (West 1994).

<sup>164</sup> *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d)(1) (2002); MINN. STAT. ANN. § 595.024 (West 2000); OKLA. STAT. ANN. tit. 12, § 2506(B)(2) (West 1993); TENN. CODE ANN. § 24-1-208(2) (2000); D.C. CODE ANN. § 16-4703(a) (LexisNexis 2005).

<sup>165</sup> *See, e.g.*, FLA. STAT. ANN. § 90.5015(2) (West 1999); LA. REV. STAT. ANN. § 45-1459 (West 1999).

<sup>166</sup> N.C. GEN. STAT. § 8-53.11(3)(C) (2003).

<sup>167</sup> *See, e.g.*, DEL. CODE ANN. tit. 10, § 4323 (1999). Delaware provides an absolute reporter privilege when it comes to sources, but instructs judges to use a balancing test in regard to whether a reporter should be compelled to reveal information. *Id.* § 4323.

<sup>168</sup> *See* ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (2003); D.C. CODE ANN. § 16-4703(b) (LexisNexis 2005).

<sup>169</sup> Arkansas's shield law has not been updated to explicitly cover television reporters.

<sup>170</sup> ARK. CODE ANN. § 16-85-510 (2005).

<sup>171</sup> MICH. COMP. LAWS ANN. § 767.5A (West 2000).

<sup>172</sup> OR. REV. STAT. § 44.520(2) (1983).



### D. *Absolute Privilege*

Ten states have enacted shield laws codifying an absolute privilege against compelled disclosure.<sup>173</sup> Because this Note argues for the enactment of a federal shield law providing absolute protection to reporters, these state laws will be scrutinized (1) to examine how state legislatures wishing to completely shield reporters from testimony have codified their intentions, and (2) to demonstrate that intent does not always translate into the desired result.

Although all ten of these states recognize an absolute reporter privilege, their statutes differ both in wording and in substance, thereby resulting in significant differences in protection for journalists. Indeed, while at first blush the statutes' wording seems to grant an absolute privilege, in some cases that privilege places conditions or limitations on the sources or information protected. For example, Alabama's shield law<sup>174</sup> provides an absolute privilege, but only regarding "sources of any information procured . . . and published . . ."<sup>175</sup> Kentucky's statute similarly shields only those sources who provided reporters with material that is ultimately published or aired.<sup>176</sup> Thus, these statutes, at least read literally, do not prevent reporters from being compelled to divulge the source of unpublished information,<sup>177</sup> or any confidential or nonconfidential information that is published or unpublished. In other words, the only thing that receives absolute protection is a source whose information has been published by the reporter.

Shield laws in Indiana, Ohio, and Pennsylvania prevent a reporter from being forced to disclose a news source, whether or not that source is confidential and whether or not the information the source provided to the reporter is actually published.<sup>178</sup> However, the states' laws offer no explicit

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<sup>173</sup> States providing an absolute statutory privilege to reporters are Alabama, California, Indiana, Kentucky, Montana, Nebraska, Nevada, New York, Ohio, and Pennsylvania.

<sup>174</sup> See ALA. CODE § 12-21-142 (2005). The spirit, as well as some of the wording of Alabama's shield law, are embodied in the proposed federal shield statute, discussed in Part VII.

<sup>175</sup> ALA. CODE § 12-21-142 (2005) (emphasis added).

<sup>176</sup> See KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005).

<sup>177</sup> This is exactly the type of information for which Judith Miller was subpoenaed. For further discussion of Miller's case, see *supra* notes 113-26 and accompanying text.

<sup>178</sup> See IND. CODE ANN. § 34-46-4-2 (West 1999); OHIO REV. CODE ANN. § 2739.04 (West 1994). With similar language, OHIO REV. CODE ANN. § 2739.12 (West 1994) provides an absolute privilege to print journalists seeking to keep their sources confidential. See also 42 PA. CONS. STAT. ANN. § 5942(a) (West 2000).

protection whatsoever for any kind of information that a reporter has gathered. Additionally, in order for Ohio radio and television stations to earn the protection of the state's shield law, these stations must keep for six months records of any information their journalists have obtained in the course of their news gathering.<sup>179</sup> Pennsylvania mandates that radio and television stations keep "an exact recording" of broadcasts for at least a year from the airdate in order to be afforded state shield law protections.<sup>180</sup> Hence, Ohio's and Pennsylvania's shield laws end up being absolute for print reporters and their sources, but not necessarily for radio or broadcast journalists.

California not only codified a reporter privilege, it also provided for the privilege in its state constitution. California's Constitution, as well as its Code of Evidence, state that journalists cannot be found in contempt for refusing to divulge news sources and unpublished information.<sup>181</sup> Nevertheless, California's shield is incomplete—the statute mentions nothing regarding a reporter's right to refuse to disclose published information.

New York's lengthy shield law distinguishes between "confidential news" and "nonconfidential news" in delineating the specifics of its reporter privilege. The statute prohibits journalists from being found in contempt for declining to disclose "any news obtained or received in confidence or the identity of the source of any such news" provided to the journalist.<sup>182</sup> On the other hand, when a reporter is being compelled to disclose either "unpublished news . . . or the source of any such news," the privilege is qualified, and does not apply when the party seeking the disclosure shows by clear and specific evidence the information "(i) is highly material and

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<sup>179</sup> See OHIO REV. CODE ANN. § 2739.04 (West 1994).

<sup>180</sup> See 42 PA. CONS. STAT. ANN. § 5942(b) (West 2000).

<sup>181</sup> See CAL. CONST. art. I, § 2(b) (West 2002); CAL. EVID. CODE § 1070 (West 1995). California's constitution provides:

[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

CAL. CONST. art. I, § 2(b) (West 2002). The same constitutional protection is granted to radio and television reporters as well. *Id.* With substantially similar wording, California's code of evidence reiterates the absolute privilege against being compelled to disclose sources and unpublished information. CAL. EVID. CODE § 1070 (West 1995).

<sup>182</sup> N.Y. CIV. RIGHTS LAW § 79-H(b) (McKinney 1992).

relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.”<sup>183</sup>

Nebraska's statute, known as the Free Flow of Information Act,<sup>184</sup> prevents compelled disclosure of a reporter's source of published and unpublished information, as well as any unpublished (or unaired) information.<sup>185</sup> It does not appear to protect reporters from compelled disclosure of published/aired information.

The two remaining states with absolute shield laws—Montana and Nevada—seem to provide the most complete protection to reporters and their sources. Montana's shield law prevents compelled disclosure of “any information . . . or the source of that information,” drawing no distinctions between confidential-nonconfidential or published-unpublished.<sup>186</sup> Nevada's statute protects journalists from having to reveal their sources, as well as published and unpublished information.<sup>187</sup>

### E. Internet Journalists

A nearly universal and increasingly important problem among state shield laws is their exclusion from protection of journalists whose work is not featured in “traditional” media (i.e., newspapers, magazines, radio, or television). Internet reporting, including media websites maintained by traditional media outlets, as well as web logs, occupies a significant position in today's journalistic landscape.<sup>188</sup> Although a shield for internet reporters

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<sup>183</sup> N.Y. CIV. RIGHTS LAW § 79-H(C) (McKinney 1992).

<sup>184</sup> NEB. REV. STAT. ANN. § 20-147 (LexisNexis 1999). Nebraska's shield law shares a name with two federal shield bills currently before Congress. See *supra* notes 219–23 and accompanying text for an examination of the federal Free Flow of Information Act proposals.

<sup>185</sup> NEB. REV. STAT. ANN. § 20-146 (LexisNexis 1999). Within the Free Flow of Information Act, the Nevada legislature expressly states its findings that, *inter alia*, forcing journalists to disclose sources or unpublished information is “contrary to the public interest and inhibits the free flow of information to the public.” NEB. REV. STAT. ANN. § 20-144 (LexisNexis 1999).

<sup>186</sup> MONT. CODE ANN. § 26-1-902(1) (2005). The statute goes further to state that reporters who refuse to disclose sources and information may not be held in contempt, thereby reiterating the absolute nature of the state's shield law. MONT. CODE ANN. § 26-1-902(2) (2005).

<sup>187</sup> NEV. REV. STAT. ANN. § 49.275 (Michie 2002).

<sup>188</sup> See *infra* notes 240–42 for a discussion of bloggers and whether they should be granted a privilege against compelled disclosure.

may potentially be read into some state statutes,<sup>189</sup> very few states grant statutory protection to such journalists.<sup>190</sup>

This analysis has shown that while most states seem to agree that reporters deserve statutory protection against compelled disclosure, states do not agree on the scope of the privilege. Furthermore, the states that have tried to grant reporters an absolute privilege have not always succeeded in drafting laws that reflect that intent. The current paltry federal safeguards available to reporters appear to be even less effective in the journalistic fight against forced disclosure.

## VI. FEDERAL LAW

### *A. Federal Regulations Regarding Subpoenaing Reporters*

Reporters are not completely without federal protection against compelled disclosure of sources and information. More than thirty-five years ago, the U.S. Department of Justice promulgated regulations governing the issuance of subpoenas to the media.<sup>191</sup> These regulations provide an insufficient safeguard for reporters because the regulations themselves are qualified rather than absolute, because courts have not always enforced the regulations, and because the punishment for failing to follow them is minimal, if existent at all.

The history of regulations regarding press subpoenas dates back to the Nixon Administration. U.S. Attorney General John Mitchell first announced the regulations in a 1970 speech.<sup>192</sup> Three years later, Attorney General

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<sup>189</sup> See, e.g., NEB. REV. STAT. ANN. § 20-145(2) (LexisNexis 1999) (defining journalistic “[m]edium of communication” as not limited to traditional news sources); see also S.C. CODE ANN. § 19-11-100 (Law Co-op. Supp. 2005) (providing a qualified privilege to journalists who have disseminated “news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium”).

<sup>190</sup> Only Illinois and New Jersey have shield laws that seem to protect internet journalists. See 735 ILL. COMP. STAT. ANN. 5/8-902(b) (West 2003) (“[N]ews medium’ means any newspaper or other periodical issued at regular intervals whether in print or electronic format . . . .”); N.J. STAT. ANN. § 2A:84A-21a(a) (West 1994) (“‘News media’ means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.”).

<sup>191</sup> 28 C.F.R. § 50.10 (2005).

<sup>192</sup> Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department’s Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 232. Although it has been assumed that the regulations were drawn up in response to the Supreme Court’s opinion in *Branzburg v. Hayes*, Attorney General Mitchell’s speech

Elliott Richardson officially promulgated the regulations,<sup>193</sup> which were eventually broadened to include telephone records among the items covered by the Justice Department's regulatory procedures for media subpoenas.<sup>194</sup> In his plurality opinion in *Branzburg v. Hayes*, Justice White detailed the history of the regulations, postulating that they "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials."<sup>195</sup>

The stated policy objective of the regulations is to "provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function."<sup>196</sup> To determine whether subpoenaing a reporter is appropriate in a particular instance, the Justice Department calls for a balancing test, weighing the public interest in the free flow of news against the public interest in "effective law enforcement and the fair administration of justice."<sup>197</sup> This balancing seems to allow for a great deal of subjectivity, thereby resulting in differing degrees of protection for reporters from subpoenas, depending on any given Justice Department's viewpoint on the importance of these countervailing considerations.

The language of the regulations themselves is sufficiently open-ended as to afford Justice officials seeking compelled disclosure from reporters and news organizations a relatively easy avenue for issuing subpoenas. For example, the regulations require "reasonable attempts" to obtain the needed information elsewhere.<sup>198</sup> Exactly what constitutes a reasonable attempt is a question for the courts, if they choose to enforce the regulations at all. At least one circuit has decided not to do so.<sup>199</sup>

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occurred two years prior to the *Branzburg* decision. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Id.* at 231–32.

<sup>193</sup> Liptak, *supra* note 192, at 232.

<sup>194</sup> Policy with Regard to Issuance of Subpoenas to Members of News Media, Subpoenas for Telephone Toll Records of Members of News Media, and Interrogation, Indictment, or Arrest of, Members of News Media, 45 Fed. Reg. 76,436, 76,436–38 (Nov. 19, 1980) (codified at 28 C.F.R. § 50.10 (2005)).

<sup>195</sup> *Branzburg*, 408 U.S. at 706–07 & n. 41. Justice White's opinion also called the regulations a "major step in the direction the reporters . . . desire to move." *Id.* at 707.

<sup>196</sup> 28 C.F.R. § 50.10 (2005).

<sup>197</sup> *Id.* § 50.10(a).

<sup>198</sup> *Id.* § 50.10(b).

<sup>199</sup> See *In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992) (determining that the regulation was "of the kind to be enforced internally by a governmental department, and not by courts"). Another significant problem with the regulations is their failure to define "media." It is, therefore, unclear whether internet reporters are included in the term, because the regulations were promulgated several decades prior to the rise of internet journalism.

Furthermore, the regulations delineate two different, albeit equally nebulous, standards for determining whether a press subpoena is appropriate in a given criminal or civil case. For criminal cases, the regulations state that there "should be reasonable grounds to believe . . . that a crime has occurred, and that the information sought is essential to a successful investigation . . . ." <sup>200</sup> What constitutes "reasonable grounds" and a "successful investigation" is up for interpretation, thus making it unclear to reporters the degree to which the regulations shield them from compelled disclosure.

In civil cases, subpoenas should be issued if there are "reasonable grounds . . . to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance." <sup>201</sup> Again, the language employed lacks precise meaning—what are considered "reasonable grounds" may vary from courtroom to courtroom, and how to determine whether a particular case meets the "substantial importance" standard is equally vexing, as no criteria are provided to guide judges in this determination.

Finally, the repercussions for failure to play by the subpoena rules consist of little more than a rap on the knuckles for the violator. The only explicit reference to consequences for disregarding the regulations comes in the final paragraph of 28 C.F.R. § 50.10, which states that "[f]ailure to obtain the prior approval of the Attorney General [before issuing a subpoena to a reporter] *may* constitute grounds for an administrative reprimand or other appropriate disciplinary action." <sup>202</sup> Thus, not only is punishment for noncompliance seemingly optional, such optional disciplinary action applies only to the failure to seek the Attorney General's authorization for the subpoena—it does not appear to apply to other potential violations of the regulation, such as failure to seek the needed information from alternative sources <sup>203</sup> or failure to negotiate with the media prior to issuing a subpoena. <sup>204</sup> Devoid of consequences to spark compliance among federal

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<sup>200</sup> 28 C.F.R. § 50.10(f)(1) (2005).

<sup>201</sup> *Id.* § 50.10(f)(2).

<sup>202</sup> *Id.* § 50.10(n) (emphasis added).

<sup>203</sup> 28 C.F.R. § 50.10(f)(3) requires the government to try (and fail) to obtain the necessary information it seeks from an "alternative nonmedia source[]."

<sup>204</sup> See *Id.* § 50.10(c), which mandates negotiations with the member of the media to whom the government wishes to issue a subpoena. Moreover, the regulations state that they "are not intended to create or recognize any legally enforceable right." 28 C.F.R. § 50.10(n) (2005). Courts have pointed to this wording when reporters seek to have subpoenas quashed on the grounds of governmental failure to comply with the Justice Department's regulations. See, e.g., *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d

officials to whom they apply,<sup>205</sup> and not applicable to state officials and county prosecutors, the press subpoena regulations offer questionable protection to reporters. Thus, a federal law is needed to ensure reporters are safeguarded from compelled disclosure.

### B. *The History of Federal Shield Laws*

Since 1929, several members of Congress have introduced proposals for federal shield laws.<sup>206</sup> Not one single shield bill has ever become law. The long history of congressional attempts to pass a federal reporter shield law will be explored, including the recent efforts by Senators Christopher Dodd and Richard Lugar, as well as Representatives Mike Pence and Rick Boucher, to protect reporters from compelled disclosure in the wake of the Judith Miller and Matthew Cooper cases.<sup>207</sup>

When Kansas Senator Arthur Capper introduced the first bill providing for a newsperson's privilege, on November 20, 1929,<sup>208</sup> he had no way of knowing that his would be the first of more than sixty failed attempts to shield reporters from the government's subpoena power.<sup>209</sup> Although

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964, 975 (D.C. Cir. 2005) (reiterating the regulations' express statement that they do not create a legally enforceable right); *In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992) (same).

<sup>205</sup> The regulations expressly state that they apply to all members of the Department of Justice. 28 C.F.R. § 50.10 (2005); *see also* Liptak, *supra* note 192, at 234–35 (noting that the regulations have been interpreted to apply to government lawyers and independent counsel as well).

<sup>206</sup> Ervin, *supra* note 24, at 241 n.23.

<sup>207</sup> Senator Dodd first introduced S. 3020, entitled the Free Speech Protection Act of 2004, during the 108th Congress on November 19, 2004. 150 CONG. REC. S11646 (2004). Dodd re-introduced his federal shield legislation, S. 369, on February 14, 2005, as the Free Speech Protection Act of 2005. 151 CONG. REC. S1344 (2005). Representatives Pence and Boucher introduced H.R. 581, the Free Flow of Information Act, on February 2, 2005. 151 CONG. REC. H290-91, 352 (2005). A week later, Senator Lugar proposed S. 340, a bill with language nearly identical to Pence and Boucher's. 151 CONG. REC. S1199 (2005). Pence and Boucher re-introduced their bill as H.R. 3323 on July 18, 2005. 151 CONG. REC. H5963 (2005).

<sup>208</sup> 71 CONG. REC. 5832 (1929).

<sup>209</sup> *See, e.g.*, S. 3552, 91st Cong. (1970); S. 1311, 92d Cong. (1971); S. 3786, 92d Cong. (1972); S. 3932, 92d Cong. (1972); H.R. 16527, 92d Cong. (1972); S. 3925, 92d Cong. (1972); H.R. 717, 93d Cong. (1973); H.R. 1263, 93d Cong. (1973); H.R. 1735, 93d Cong. (1973); H.R. 1985, 93d Cong. (1973); H.R. 2002, 93d Cong. (1973); H.R. 2015, 93d Cong. (1973); H.R. 2230, 93d Cong. (1973); H.R. 2433, 93d Cong. (1973); H.R. 2563, 93d Cong. (1973); H.R. 2584, 93d Cong. (1973); H.R. 3369, 93d Cong. (1973); H.R. 3520, 93d Cong. (1973); H.R. 3741, 93d Cong. (1973); H.R. 3964, 93d Cong. (1973); H.R. 3975, 93d Cong. (1973); H.R. 4383, 93d Cong. (1973); H.R. 5167, 93d Cong. (1973); H.R. 5194, 93d Cong. (1973); H.R. 5322, 93d Cong. (1973); H.R. 5908, 93d Cong. (1973); H.R. 14981, 93d Cong. (1974); H.R. 15242, 93d Cong.

proposed federal shield legislation peppered the decades of the first half of the twentieth century, the 1960s and 1970s marked the beginning of an era in which the relationship between the press and the government reached new levels of antagonism and the need for such laws became significantly more critical.<sup>210</sup> Shortly after and in response to *New York Times* reporter Earl Caldwell receiving a subpoena<sup>211</sup> ordering him to produce information gleaned from his coverage of the Black Panthers, Senator Thomas H. McIntyre introduced a bill calling for a reporter's testimonial privilege.<sup>212</sup> Although the Ninth Circuit ruled in Caldwell's favor, requiring "a compelling and overriding national interest"<sup>213</sup> before a journalist could be forced to divulge sources or appear before a grand jury, Congress again tried (and failed) to legislate explicit protection for reporters.<sup>214</sup>

Within twenty-four hours of the Supreme Court's decision in *Branzburg v. Hayes* rejecting the existence of a constitutionally-based reporter privilege,<sup>215</sup> Senator Alan Cranston introduced a bill providing an absolute privilege against compelled testimony in federal and state judicial proceedings.<sup>216</sup> Several bills proposing a qualified privilege soon followed, both in the 92d and 93d Congresses.<sup>217</sup> In 1973 alone, sixty-five bills were

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(1974); S. 318, 93d Cong. (1973); S. 750, 93d Cong. (1973); S. 1726, 93d Cong. (1973); H.R. 172, 94th Cong. (1975); H.R. 562, 94th Cong. (1975); H.R. 14309, 95th Cong. (1978); H.R. 368, 96th Cong. (1979); S. 3020, 108th Cong. (2004).

<sup>210</sup> See Ervin, *supra* note 24, at 243. Ervin cites the 1960s as the decade in which the traditionally adversarial relationship of the media and the government escalated into outright combat. *Id.* The United States Attorney's office began issuing subpoenas to reporters. *Id.* at 244-45. Indeed, from 1969 to 1971, the government served 121 subpoenas on NBC and CBS and their affiliates; one reporter from the *Chicago-Sun Times* was summoned to testify in eleven separate judicial proceedings in an eighteen-month period, and the *New York Times* watched as its subpoena toll grew from five from 1964 to 1968 to three in 1968 to six in 1969 to twelve in 1970. *Id.* at 245.

<sup>211</sup> Caldwell's case was one of the four cases consolidated by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 675-79 (1972). See *supra* Part III for an analysis of *Branzburg*.

<sup>212</sup> Ervin, *supra* note 24, at 250-51.

<sup>213</sup> *Caldwell v. United States*, 434 F.2d 1081, 1086 (9th Cir. 1970). The Ninth Circuit's holding was overruled by the Supreme Court when it considered Caldwell's case along with the three others in *Branzburg*. *Branzburg*, 408 U.S. at 708.

<sup>214</sup> S. 1311, 92d Cong. (1971).

<sup>215</sup> *Branzburg*, 408 U.S. at 667. See *supra* Part III for a discussion of *Branzburg*.

<sup>216</sup> S. 3786, 92d Cong. (1972); see also Ervin, *supra* note 24, at 255.

<sup>217</sup> S. 3932, 92d Cong. (1972); H.R. 16527, 92d Cong. (1972); S. 3925, 92d Cong. (1972). In the first month of 93d Congress, eight bills and one joint resolution were introduced in the Senate; fifty-six bills were introduced in the House. Ervin, *supra* note 24, at 261. Ervin, one of the Senators who sponsored reporter privilege legislation, notes that thirty-two Senators and nearly one-third of the House's membership in the 93d Congress supported the passage of a federal shield law. *Id.*



introduced that would have provided some form of protection to reporters and their sources.<sup>218</sup>

Although the number of proposed federal reporter shield laws has declined since 1973,<sup>219</sup> the recent subpoenas and resulting contempt charges for WJAR investigative reporter Jim Taricani, *New York Times* reporter Judith Miller, and *Time* reporter Matthew Cooper have sparked renewed interest and concern on Capitol Hill.<sup>220</sup> On November, 19, 2004, Connecticut Senator Christopher Dodd introduced the Free Speech Protection Act of 2004.<sup>221</sup> Citing the need for a “strong and uniformed Federal law on shielding [to] provide uniformity and consistency to the patchwork of inconsistent court decisions and State statutes currently in place,”<sup>222</sup> Dodd proposed legislation that would provide a qualified privilege for reporters against compelled disclosure of both information and news sources. However, if it had been enacted, the law would have shielded reporters only from the federal government’s, not the states’, attempts to compel disclosure, and it also would have allowed the government to subpoena reporters in certain circumstances.<sup>223</sup> Because the Free Speech Protection Act of 2004 never made it out of the Senate Judiciary Committee, the Senator re-

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<sup>218</sup> Reporters Comm. for Freedom of the Press, *A Short History of Attempts to Pass a Federal Shield Law*, NEWS MEDIA & L., Fall 2004, at 9, available at <http://www.rcfp.org/news/mag/28-4/cov-ashorthi.html> [hereinafter *Short History*].

<sup>219</sup> See, e.g., H.R. 14309, 95th Cong. (1978); H.R. 368, 96th Cong. (1979). In July of 1987, Senator Harry Reid also circulated a federal shield law draft to members of the media. The bill would have provided for complete protection against testimony and disclosure, except in cases of defamation or criminal defense. *Short History*, *supra* note 218.

<sup>220</sup> When Senator Dodd first introduced his proposed reporter shield law to the Senate, he spoke of both Taricani and Miller, calling the situation in which Miller found herself, “[p]erhaps the most alarming instance in recent months of the growing threat to the sacred right to freedom of speech in America.” 150 CONG. REC. S11647 (2004).

<sup>221</sup> S. 3020, 108th Cong. (2004). A number of media organizations supported Senator Dodd’s efforts. See, e.g., Press Release, Reporters Without Borders, Reporter Sentenced to 6 Months of Home Confinement for Refusing to Reveal His Source (Sept. 12, 2004), [http://www.rsf.org/print.php3?id\\_article=12055](http://www.rsf.org/print.php3?id_article=12055).

<sup>222</sup> 150 CONG. REC. S11647 (2004).

<sup>223</sup> Dodd’s bill would have permitted compelled disclosure when the government:

established by clear and convincing evidence that—(1) the news or information is critical and necessary to the resolution of a significant legal issue before an entity of the judicial, legislative, or executive branch of the Federal Government that has the power to issue a subpoena; (2) the news or information could not be obtained by any alternative means; and (3) there is an overriding public interest in the disclosure.

introduced the bill in the 109th Congress.<sup>224</sup> The bill's wording could possibly be construed to cover internet journalists, as well as members of the more traditional media.<sup>225</sup>

Another recent effort to pass a federal shield law occurred in the House. Representatives Pence and Boucher first introduced the Free Flow of Information Act in February of 2005, noting that "[c]ompelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about government activity would be shut down."<sup>226</sup> Senator Richard Lugar offered a companion bill in the Senate.<sup>227</sup> Like Senator Dodd's bill, the Pence-Boucher and Lugar shield laws are qualified, requiring a federal entity to show by clear and convincing evidence that it has "unsuccessfully attempted to obtain" the information or source names sought elsewhere before seeking compelled disclosure from a reporter.<sup>228</sup>

Furthermore, if the government subpoenas a reporter to obtain either information or the identity of sources in a criminal matter, the bills require the government to demonstrate, also by clear and convincing evidence, that "there are reasonable grounds to believe that a crime has occurred" and that the information "sought is essential" to the case or investigation.<sup>229</sup> If enacted, the bills would cover the traditional media, including newspaper, radio, and television reporters, and, by their terms, also seem to cover book publishers.<sup>230</sup> While the bills state that any "entity that disseminates

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<sup>224</sup> S. 369, 109th Cong. (2005); *see also* Associated Press, Bill to Create Federal Shield Law Introduced in House (Feb. 2, 2005), <http://www.firstamendmentcenter.org/news.aspx?id=14782&SearchString=dodd>.

<sup>225</sup> The bill's definition of "news media" includes "any printed, photographic, mechanical, or electronic means of disseminating news or information to the public." S. 3020. The word "electronic" could be interpreted to provide protection to internet journalists, although the bill expressly states it would protect newspaper, magazine, radio, and television reporters and does not explicitly mention the internet. S. 3020.

<sup>226</sup> 151 CONG. REC. H291 (2005). Pence expressed concerns that nearly a dozen journalists who refused to divulge confidential sources faced or served jail time in at least three federal jurisdictions in 2004. 151 CONG. REC. H290 (2005).

<sup>227</sup> 151 CONG. REC. S1199 (2005). Senator Lugar's bill, S. 340, is also entitled the Free Flow of Information Act of 2005. S. 340, 109th Cong. (2005).

<sup>228</sup> *See* H.R. 581, 109th Cong. (2005); S. 340.

<sup>229</sup> H.R. 581; S. 340. For civil cases and investigations, the information or testimony must be "essential to a dispositive issue of substantial importance to that matter." H.R. 581; S. 340.

<sup>230</sup> H.R. 581; S. 340.

information by . . . electronic . . . means” is covered, they do not expressly refer to internet reporters as among the media protected.<sup>231</sup>

Even if any of these three bills making their way through Congress<sup>232</sup> is ultimately passed by both the House and the Senate, journalists would not receive complete protection from compelled disclosure, because all of the bills are qualified, thereby leaving it to judges to decide whether a reporter should be forced to reveal a source in a particular case. Only an absolute shield law enacted at the federal level would assure that all journalists, the sources they protect, and the people to whom they disseminate news and information, are protected.

## VII. THE NEED FOR AN ABSOLUTE REPORTER PRIVILEGE: A FEDERAL SHIELD LAW PROPOSAL

The recent high profile cases of Jim Taricani, Judith Miller, and Matthew Cooper are three of undoubtedly many that showcase the deficiencies in the current state-by-state system for shielding reporters and their confidential sources, and that highlight the illusory nature of the Justice Department regulations’ protection for journalists. In order to ensure that sources will continue to come forward with critical information and that reporters are able to vigorously pursue their stories unencumbered by concern over potential subpoenas, Congress should enact a federal shield law, like the one proposed

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<sup>231</sup> H.R. 581; S. 340. The bills cover people who publish newspapers, books, and periodicals, as well as those who operate radio and television stations and wire services. *Id.* Cable and satellite operators are also protected. *Id.* Interestingly, in describing the media protected, the bills require only that the entities covered “disseminate[]” information, not news. *Id.* The proposed legislation could, for example, be interpreted to cover radio DJs, who disseminate information, but not necessarily news.

<sup>232</sup> The Dodd and Lugar bills were referred to the Senate Judiciary Committee. Pence and Boucher reintroduced their bill in July of 2005. The bill, now known as H.R. 3323, is still in the House Judiciary Committee. H.R. 3323, 109th Cong. (2005). On September 30, 2005, the day after Judith Miller’s release from jail, Representative Pence issued a call to his congressional colleagues to pass the federal shield law:

While I am relieved that Judith Miller’s courageous ordeal has come to an end, the American people should know that the freedom of the press is still behind bars. Until Congress acts to ensure that reporters can keep their sources confidential, the freedom of the press and the public’s right to know will risk the same fate as this brave journalist. Congress must pass the Free Flow of Information Act.

*Rep. Pence Comments on Judith Miller’s Release from Jail*, U.S. FED. NEWS, Sept. 30, 2005, at 1. A little over a month later, Senator Lugar announced on the Senate floor his support for Reporters Without Borders Jailed Journalists’ Support Day, invoking the name of Judith Miller and asking for Congress to pass the Free Flow of Information Act. *Sen. Lugar Recognizes Jailed Journalists Day*, U.S. FED. NEWS, Nov. 18, 2005, at 1.

here, in the tradition of Justice Douglas's dissent in *Branzburg v. Hayes*<sup>233</sup>—that is, a law that provides an absolute reporter privilege against compelled disclosure of all sources and information. The arguments supporting an absolute federal shield law, which will also be examined, outweigh any countervailing concerns about such a statute.

### A. *Freedom of the Press Act of 2006*

The following is a proposed federal shield law against compelled disclosure:

#### Freedom of the Press Act of 2006

##### Section 1. Definitions.

##### In this Act:

"News media" means newspaper, magazine, television, radio, news website, press association, wire service or other professional journalist or news organization.

"Newspaper" means a paper that is printed and distributed regularly and not less frequently than once weekly, and that contains news, and may contain editorials, features, advertising, or other material considered of current public interest.

"Magazine" means a publication that is published and distributed regularly, and that contains news, and may contain editorials, features, advertising, or other material considered of current public interest.

"News website" means an internet site maintained by a professional journalist or professional news organization created for the sole purpose of disseminating news on a regular basis with the sole intent of providing that news to the public.

"Press association" means an association of newspapers or magazines formed to gather or disseminate news to its members.

"Wire service" means a news agency that distributes news copy to subscribing newspapers, magazines, television stations, radio stations, or other news organizations.

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<sup>233</sup> See *supra* text accompanying notes 97–103.

“Professional journalist” means one who, for gain or livelihood, is regularly engaged in gathering, preparing, collecting, writing, editing, filming, taping, or photographing news and information with the intent of disseminating that news or information to the public.

“News organization” means an entity that, for gain or livelihood, is regularly engaged in gathering, preparing, collecting, writing, editing, filming, taping, or photographing news and information with the intent of disseminating that news or information to the public.

“News” means written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare.

“Source” means any person from whom, or any means by or through which, news and information is received or procured by a professional journalist or news organization, while engaged in gathering, preparing, collecting, writing, editing, filming, taping, or photographing news and information, regardless of whether the professional journalist or news organization was requested to hold confidential the identity of such person or means.

## Section 2. Absolute privilege against compelled disclosure of sources.

No member of the news media, while in the course of gathering, preparing, collecting, writing, editing, filming, taping, photographing, or presenting news or information shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or any tribunal officer’s agent or agents or before any committee of a legislature or elsewhere any source of news or information obtained by that member of the news media, regardless of whether the source is confidential or known and regardless of whether the news or information is published or unpublished.

## Section 3. Waiver of privilege.

A person to whom, or organization to which, the privilege against compelled disclosure in Section 2 applies does not waive or forfeit the privilege by voluntarily disclosing to any other person a source or all or any part of the news or information protected by the privilege.

## Section 4. Illegally procured sources, news, and information.

A person who, or organization that, would otherwise be able to claim the privilege against compelled disclosure in Section 2 cannot claim such a privilege regarding any source, news, or information procured through illegal means.

## B. Analysis of the Freedom of the Press Act of 2006

### 1. Statutory Language

The Freedom of the Press Act of 2006 (FPA) borrows some of its language from state shield laws<sup>234</sup> currently in force throughout the country. Some of the FPA's definitions are modeled after those contained in Colorado's, the District of Columbia's, New Jersey's, and New York's statutes.<sup>235</sup> Alabama's absolute privilege against compelled disclosure inspired the wording of Section 2 of the FPA,<sup>236</sup> while the FPA's waiver provision (Section 3) has its roots in a similar Delaware provision.<sup>237</sup>

### 2. Journalists Covered

Recognizing that journalistic endeavors now frequently stretch beyond the traditional media—newspapers, magazines, radio, and TV—the FPA includes internet reporters among the group of journalists that it protects.<sup>238</sup> The shield law does not, however, extend to anyone and everyone who posts some sort of information on a website. Rather, the person or entity protected must be a professional journalist or news organization, both of which are defined in Section 1 of the FPA to include persons and organizations that gather and disseminate news to the public as a profession. For example, the proposed law would protect a television station that posts its stories on the station webpage, or a newspaper that offers exclusive articles on its website.<sup>239</sup> Those are the simple cases.

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<sup>234</sup> For an analysis of state shield laws, see *supra* Part V.

<sup>235</sup> Colorado's definition of "source" in its shield law forms the basis of the FPA's "source" definition. See COLO. REV. STAT. ANN. § 13-90-119 (LexisNexis 2004). The FPA's definition of "news media" is derived from wording in D.C. CODE ANN. § 16-4701 (LexisNexis 2005). New Jersey's shield law helped supply the definition for "magazine." See N.J. STAT. ANN. § 2A:84A-21a (West 1994). The FPA contains wording from New York's shield law definitions for "newspaper," "press association," "professional journalist," "news organization," and "news." See N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992).

<sup>236</sup> See ALA. CODE. § 12-21-142 (2005).

<sup>237</sup> See DEL. CODE. ANN. tit. 10, § 4325 (1999).

<sup>238</sup> The three shield laws introduced in the 109th Congress, for example, do not explicitly afford protection from compelled disclosure to internet journalists—a potential omission that has some media advocates concerned. See, e.g., Wendy N. Davis, *The Squeeze on the Press*, 91 A.B.A. J. 22, 23 (2005).

<sup>239</sup> It is just such a story that resulted in the subpoena of Matthew Cooper. For a discussion of Cooper's case, see *supra* notes 115–32 and accompanying text.

The more difficult questions arise when the person seeking protection is the author of a web log (blog). Here there is inevitably some room for judicial discretion. Bloggers may argue that if the FPA were to shield all traditional media from compelled disclosure, they too should receive protection.<sup>240</sup> The FPA would apply to a blogger whose, in the words of the proposed statute, “sole purpose” is the dissemination of news with the “sole intent” of passing along that news to the general public. The courts may, therefore, be called upon to conduct a case-by-case inquiry as to whether the blogger is disseminating news. Some factors the court would likely want to consider in determining whether a blogger is covered by the statute include (1) the blogger’s methods of gathering and presenting information, (2) the extent to which the information posted involves matters of public concern or public interest, (3) the timeliness of the information posted, and (4) the regularity with which the blogger is posting.<sup>241</sup> While the FPA may not cover “the stereotypical ‘blogger’ sitting in his pajamas at his personal computer posting on the World Wide Web”<sup>242</sup> his opinions on any conceivable topic, it would certainly not exclude all bloggers from its shield.

### 3. *Scope of the Reporter’s Privilege*

As is apparent from the title of Section 2 of the statute, the FPA offers persons and entities that fall under the definition of “news media” an absolute shield from compelled disclosure. The statutory text contains a nonexhaustive list of circumstances in which a journalist cannot be subpoenaed to testify, disclose a source, or provide information, including the words “or elsewhere” as a catch-all provision for any circumstances that may not have been specifically delineated. Additionally, the FPA covers all of a journalist’s news and information, published or unpublished, and also

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<sup>240</sup> See, e.g., Eugene Volokh, *You Can Blog, but You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39 (arguing that “[t]he First Amendment can’t give special rights to the established news media and not to upstart outlets . . . Freedom of the press should apply to people equally, regardless of who they are, why they write or how popular they are”).

<sup>241</sup> For another approach to the debate regarding whether to include bloggers among journalists protected by shield laws, see Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1375–76 (2003) (arguing for an approach that focuses not on the medium in which an individual disseminates information, but on the process by which the individual gathers that information).

<sup>242</sup> *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring).

protects both confidential and identified sources, thereby ensuring that the privilege is absolute.

Recognizing that reporters may need to divulge a confidential source or piece of information to another person affiliated with their news organization—for example, a TV reporter may have to discuss confidential information with her producer or news director to determine how to cover a story—and acknowledging that a reporter may actually choose to share some aspect of a news story with someone outside of her news organization (e.g., a spouse), the FPA expressly states that disclosure of sources or information does not result in a forfeiture of the statute's protection. The only situation in which a journalist automatically loses the protection against compelled disclosure occurs when the journalist illegally procures sources or information. Codifying a right to commit a crime in order to cover a story certainly cuts against public policy.

### *C. The Purpose of the FPA: What Interests Does It Serve?*

The FPA serves a number of critically important purposes and interrelated interests: it (1) ensures the free flow of information to the public, (2) encourages individuals with knowledge of wrongdoing to come forward, (3) provides a further check on the branches of government, (4) furthers judicial efficiency, and (5) creates a uniform framework for handling issues of compelled disclosure.

The FPA fosters communication between sources and reporters, as well as between reporters and the general public. The Taricani, Miller, and Cooper cases demonstrate the very real possibility that promises of confidentiality from reporter to source may result in either an unmasking of the secret source or in the threat of jail time for the reporter.<sup>243</sup> A potential source who wishes to remain anonymous may take one look at the current state of the law (i.e., the varying levels of protection afforded by state statutes painted atop a backdrop of the Supreme Court's *Branzburg* decision

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<sup>243</sup> These cases, and others like them, have prompted countless news organizations to issue calls through their publications' editorial pages for federal shield protection. See, e.g., Editorial, *The Courts vs. the Press*, BUSINESSWK., Mar. 7, 2005, at 124; Editorial, *Protecting the Right to Know: Federal "Shield Law" for Reporters Is in the Public's Interest*, SARASOTA HERALD TRIB., Feb. 27, 2005, at F2; Editorial, *Pass Federal Shield Law*, DESERET MORNING NEWS, Feb. 23, 2005, at A14; Editorial, *Shield for Protection: The Public Interest in Unnamed Sources*, AKRON-BEACON J., Feb. 20, 2005, at B3; Editorial, *Reporters Face Time for No Crime*, DENVER ROCKY MOUNTAIN NEWS, Feb. 17, 2005, at 44A; Editorial, *Free Press at Stake*, LAS VEGAS SUN, Feb. 16, 2005, at A20; Editorial, *Time to Put Up a Shield for Reporters*, INDIANAPOLIS STAR, Feb. 12, 2005, at A10; Editorial, *Preserving a Free Press: Solution Calls for Federal Shield Law*, WASH. TIMES, Jan. 7, 2005, at A19 (calling for Congress to enact a federal reporter shield law).



and the differing conclusions the lower courts have drawn from it) determine the risk of being revealed is just too great, and decide to keep newsworthy information to him or herself. If the information is the latest celebrity gossip, very little may be lost in silencing the source. If, however, the information is that a local company is dumping carcinogenic chemicals into the river, or the mayor is taking bribes (as was the situation in the Taricani case), then the de facto gag order may place the public in peril, or allow governmental corruption to flourish.<sup>244</sup>

The FPA would further the public policy in favor of whistleblowing, which, in many cases, is the only way in which wrongdoing may be exposed. There is likely no way of knowing how many people with vital, albeit potentially damaging, confidential, or otherwise sensitive information are deterred from coming forward due to concerns of being revealed and subsequently subject to reprisal. Although some, including Justice White in *Branzburg*, scoff at the notion of a “chilling effect” among news sources,<sup>245</sup> journalists say sources will indeed dry up in the absence of a recognized privilege against compelled disclosure.<sup>246</sup> The FPA would put an end to the uncertainty, creating a nationwide shield for journalists and their sources.<sup>247</sup>

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<sup>244</sup> See Press Release, Senator Richard Lugar, Lugar Introduces Bill to Shield Media (Feb. 9, 2005), available at <http://lugar.senate.gov/pressapp/record.cfm?id=231858> (emphasizing that “[p]romises of confidentiality are essential to the flow of information the public needs about its government”); see also Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 41 (1988) (concluding that even “routine” news stories regarding governmental activities depend on confidential informants, not to mention those that involve government wrongdoing). The need for whistleblowers is put in perspective when, considering that, in 2003, the federal government spent \$6.5 billion dollars to classify fourteen million new documents. Press Release, OpenTheGovernment.Org, “Report Card” Finds 60% Rise in Secrecy at a Rising Cost of 6.5 Billion Last Year (Aug. 26, 2004), available at <http://openthegovernment.org/article/articleview/81/1/68/?TopicID=>.

Indeed, in the wake of September 11, Judith Miller and a reporter colleague relied on confidential sources for seventy-eight articles on everything from cooperation between Pakistani intelligence and al Qaeda to the existence of weapons of mass destruction in Iraq. Petition for Writ of Certiorari at 11, *Miller v. United States*, 125 S. Ct. 2977 (2005) (No. 04-1507).

<sup>245</sup> *Branzburg v. Hayes*, 408 U.S. 665, 693–94 (1972).

<sup>246</sup> See, e.g., Editorial, *The Need for a Federal Shield*, N.Y. TIMES, Feb. 17, 2005, at A28 (referring to the Miller and Cooper cases, noting that the “chilling possibilities for journalism at large are obvious”).

<sup>247</sup> The American public appears to agree that reporters should not be forced to divulge confidential sources. In a recent poll by the First Amendment Center, seventy percent of respondents indicated that they thought journalists should be allowed to keep their sources’ identities a secret. First Amendment Center, *State of the First Amendment*

In addition to scaring off viable sources, forcing journalists to disseminate news under the constant threat of subpoena may result in self-censorship.<sup>248</sup> While reporters may be prepared to go to jail to protect their sources' identities, they are certainly not thrilled by the notion that doing time could become part of doing their job. Thus, when crafting stories, journalists may weigh a story's potential news value against the possibility of being subpoenaed, opting to omit particular details, pieces of information, or perhaps choosing to scrap a report altogether, rather than running the risk of being held in contempt for nondisclosure.<sup>249</sup> Admittedly, news organizations make daily decisions as to what to cover and what not to cover, which quotations to include in stories and which to omit, but the odds of facing compelled disclosure should not factor into decisions as to what is or is not important information for the public to read, see, or hear. If the FPA were enacted, there would be no need for self-censorship, as journalists would be gathering, writing, and disseminating news beyond the reach of the government's subpoena power.

In order to properly execute its Fourth Estate role, journalists must not be subject to subpoenas from the government officials whom they are

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2004 Survey, available at <http://www.firstamendmentcenter.org/PDF/SOFA2004results.pdf>.

<sup>248</sup> Justices Douglas and Stewart both voiced concerns regarding press self-censorship in their *Branzburg* dissents. *Branzburg*, 408 U.S. at 721–22, 731; see also Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y, 115, 139 (2003) (pointing to a potential problem of self-censorship in the absence of a federal shield law).

<sup>249</sup> Indeed, two days after Judith Miller was sent to jail, *The Cleveland Plain Dealer* announced that it would follow the advice of its lawyers and withhold publication of two significant investigative articles because the pieces were based on documents that had been leaked illegally. Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at A10. *Plain Dealer* editor Doug Clifton cited concerns that the newspaper would become embroiled in a legal battle and that its reporters might be forced to divulge confidential sources or face jail time like Miller. *Id.* "Things that are important for the public stand in jeopardy of not getting reported because of the state of the law," Clifton noted. *Fearing Court Sanctions, Ohio Paper Holds 2 Stories Based on Leaks*, CHI. SUN-TIMES, July 10, 2005, at 31.

The Reporters Committee for Freedom of the Press, which surveyed journalists throughout the country regarding subpoenas ordering disclosure of sources and information, found that some news organizations have altered their procedures to avoid being subpoenaed. "The fact that newsrooms are forced, by the threat of overburdensome subpoenas, to modify their newsgathering processes . . . represents an intrusion on their First Amendment right to gather and disseminate the news. Editorial freedom is lost when newsgatherers destroy or avoid valuable reporting for fear of compelled disclosure." REPORTERS COMM., *supra*, note 12, at 4.

responsible for keeping in check.<sup>250</sup> The FPA would shield reporters from these government-issued subpoenas, keeping prosecutors from converting members of the media into their own personal investigative unit.<sup>251</sup> The American public seems to support the “checking value”<sup>252</sup> of the media. When asked if they thought it was important for the news media to serve as governmental watchdogs, seventy-seven percent of those polled answered “yes.”<sup>253</sup> Indeed,

[t]he inevitable size and complexity of modern government [underscores] the need for well-organized, well-financed, professional critics to serve as a counterforce to government—critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public.<sup>254</sup>

Moreover, without reporters to do the digging for them, perhaps federal officials will reexamine their own investigative techniques, identify any shortcomings, and institute reforms where needed, in order to improve accountability and prevent wrongdoing. If the government were able to uncover (or even prevent) misconduct within its branches, it would no longer have a need for reporters’ sources and information to help investigate such wrongs. Until that happens, however, the FPA would ensure that journalists can carry out their watchdog function unencumbered by subpoenas threats.

An absolute privilege against compelled disclosure also allows for ease of judicial administration: Under the FPA, a court would make a threshold inquiry into whether the person or organization being subpoenaed is a member of the “news media” as that term is defined in the statute. If the answer is yes, the person or organization could not be forced to reveal a source or information. If the answer is no, the protection of the FPA would not apply, and the person or organization could be compelled to divulge the

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<sup>250</sup> See Langley & Levine, *supra* note 244, at 42 (finding “an overriding First Amendment interest in the dissemination of information to the public concerning corruption, wrongdoing and other mischief in the halls of government”).

<sup>251</sup> “[A]nnex[ing] the journalistic profession as an investigative arm of government” is precisely what Justice Stewart argued would result from the Court’s decision in *Branzburg*. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting). Justice Powell’s concurrence flatly rejected this notion. *Id.* at 709 (Powell, J., concurring).

<sup>252</sup> Professor Vincent Blasi defined the “checking value” of the press as its responsibility for “checking the abuse of official power.” Blasi, *supra* note 23, at 528.

<sup>253</sup> State of the First Amendment 2004 Survey, *supra* note 247, at 4.

<sup>254</sup> Blasi, *supra* note 23, at 541.

material that was the subject of the subpoena.<sup>255</sup> Although bright-line rules may not always be desirable, without a clearly defined federal shield law, courts could (and currently are) reaching entirely disparate conclusions on similar sets of facts.<sup>256</sup> The FPA ensures that all members of the news media are treated equally.

Some have argued for a qualified federal reporter's privilege, rather than an absolute one.<sup>257</sup> Such a privilege, they assert, would allow judges to balance the public's interest in the reporter's information being subpoenaed against the prosecutor's need for procuring that information through compelled disclosure—the balancing test urged by Justice Stewart in his *Branzburg* dissent<sup>258</sup> and articulated in a number of state shield laws, as well as in the three federal shield proposals presently before Congress. As is evidenced by the varying outcomes of cases in which courts engage in a balancing of interests, if a court wishes to compel disclosure, a qualified privilege is not a difficult hurdle to overcome.

The inevitable disparity in treatment from case to case is further exacerbated by the current hodgepodge of state shield law protection. For example, imagine three reporters, one of each living in the neighboring states of Georgia, Alabama, and Mississippi. The Alabama reporter would enjoy absolute protection against compelled disclosure,<sup>259</sup> the Georgia journalist would be covered by a qualified privilege,<sup>260</sup> and the Mississippi reporter would receive no protection at all. Additionally, in states with no shield laws, there could be a greater chance of self-censorship on the part of the press, and a lesser likelihood that sources with critical information will come

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<sup>255</sup> At least one commentator has noted an absolute reporter privilege could also decrease judges' caseloads. For instance, Pennsylvania has only a handful of appellate cases and Alabama has none. Both states have absolute reporter shield laws on the books. Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 227 (1997).

<sup>256</sup> In his plurality opinion in *Branzburg*, Justice White pointed out the inefficiencies associated with judicial administration of a qualified privilege. *Branzburg*, 408 U.S. at 703.

<sup>257</sup> See, e.g., Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 130–31 (2002); Elrod, *supra* note 248, at 127–28 (both proposing qualified federal shield laws).

<sup>258</sup> *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

<sup>259</sup> See GA. CODE ANN. § 24-9-30 (1995).

<sup>260</sup> See ALA. CODE § 12-21-142 (2005).

forward.<sup>261</sup> The FPA, which was drafted to encompass the language and spirit of several state statutes, would promote uniformity in the law, thereby eradicating the current system, which makes shield protection largely a question of geography.

#### D. *Fighting the Federalism Argument*

Though an absolute federal shield law like the FPA would create a uniform, fair, and efficient system for protecting the constitutional right to a free press, some claim that the reporter's privilege is an issue better left to the individual states to grapple with as they see fit.<sup>262</sup> This argument, however, is swiftly overcome by the fact that the Supreme Court has already invited Congress to codify the reporter privilege, thereby implicitly indicating that federal legislators have the authority to do so. Furthermore, even in the absence of this judicial "permission," Congress would be free to implement a federal shield law under the Court's current Commerce Clause jurisprudence.

In its sole treatment of the reporter's privilege, the Supreme Court dismissed the notion of a reporter's First Amendment-based privilege against compelled disclosure,<sup>263</sup> but explicitly stated that Congress would be free to implement a statutory "newsman's privilege" if it were "necessary and desirable."<sup>264</sup> Had the Court concluded that shield laws were within the purview of the states, not the federal government, it would not have suggested that Congress had the power to protect journalists on the federal level.<sup>265</sup>

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<sup>261</sup> Alexander & Bush, *supra* note 255, at 227 (1997) (discussing the possibility that the differing protections offered by state shield laws may result in a freer flow of information to the public in some states as opposed to others).

<sup>262</sup> However, a federal law providing uniform protection against compelled disclosure could hardly be seen as imposing the congressional will on the individual states, because most states have already deemed the reporter privilege important enough to preserve it through their own statutory schemes.

<sup>263</sup> For a more complete analysis of the Court's decision in *Branzburg v. Hayes*, see *supra* Part III.

<sup>264</sup> *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972). The Court even went as far as encouraging Congress, once a federal shield law was in place, to tweak the law "as experience from time to time may dictate." *Id.*

<sup>265</sup> *Id.* The *Branzburg* Court did note that there was "merit" to leaving it up to the states to enact shield laws. However, at the time of the decision, only seventeen states had enacted reporter shield statutes. *Id.* at 689–91. Now that a substantial majority has such laws, the problems of disparate treatment of reporters based purely on geography are more readily apparent. An absolute federal shield law would eradicate such inconsistencies.

Additionally, the news media and their news product fit within the category of activities delineated in the Court's most recent Commerce Clause cases as falling under Congress's Commerce Clause power. According to the Rehnquist Court:

First, Congress may regulate the use of the channels of interstate commerce . . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .<sup>266</sup>

The media, whether print, television, radio, or internet, are businesses. Although many journalists may gather news in part out of a sense of altruism, news organizations are, like any other enterprise, motivated by profit. Their commodities are news and information, which can be classified among the instrumentalities of interstate commerce that Congress may regulate. Newspapers like the *New York Times* or the *Washington Post* and magazines like *Newsweek* or *Time* may be published in one state, but they have national readerships and must cross state lines to reach their subscribers. One need look only as far as the cable television news outlets—CNN, MSNBC, Fox News Channel—to confirm that TV news programs are watched by viewers across the nation, if not the world, and that their reporters operate out of various national and international bureaus. Even local news shows are watched by viewers in different states—for instance, New Jersey residents get their TV news from New York's network affiliates. Radio stations throughout the country broadcast National Public Radio news. Internet news makes its way to countless computer screens, offering twenty-four-hour news coverage to anyone, almost anywhere.

Furthermore, as the gatherers, writers, photographers, editors, and distributors of the news that brings in viewers, readers, advertisers, and therefore profits, reporters themselves may be considered as instrumentalities of interstate commerce.<sup>267</sup> The Court's definition of the second category uses

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<sup>266</sup> *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The Court reiterated its commitment to the three-category test five years later in *United States v. Morrison*, 529 U.S. 598, 609 (2000). *Morrison* is seen as decreasing Congress's authority to regulate based on the third category (the "substantial effects" prong of the test), *see id.* at 611 (Kennedy, J., concurring), thus further narrowing the scope of congressional Commerce Clause power. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 264 (2d ed. 2002).

<sup>267</sup> *See* Elrod, *supra* note 248, at 168–70 (arguing that Congress has the authority to enact a qualified federal privilege for reporters because news, and possibly the reporters

the word “protect,” which is exactly what a federal shield law like the FPA seeks to do for reporters.

Although *Lopez* and *Morrison* are viewed as restricting Congress’s Commerce Clause authority,<sup>268</sup> Congress would still have the power to regulate news gathering and dissemination as activities that “substantially affect[] interstate commerce.”<sup>269</sup> Indeed, many media outlets are large corporations that sell millions of dollars in advertising nationwide and distribute news and information to millions of viewers or readers, affecting not only what their audiences see or hear, but also potentially what they purchase. The news and information disseminated may itself have a substantial impact on interstate commerce. Congress would likely be able to conduct a study to demonstrate, for example, the inextricable link between extensive press coverage of the dangers of Vioxx<sup>270</sup> or of Martha Stewart’s imprisonment<sup>271</sup> and the buying and selling of Merck and Stewart’s stock, respectively. Thus, by defining news and information or the journalists who provide them as instrumentalities, or noting the substantial effect that the news business has on interstate commerce, Congress would be acting well within its constitutionally prescribed powers. In passing the FPA, Congress would grant reporters the federal shield from compelled disclosure that the Supreme Court says is permissible, despite its own refusal to provide such protection.

### VIII. CONCLUSION

Americans used to have to wait for the morning paper or the six o’clock news to find out what was going on in their city, state, or country. Now websites and twenty-four-hour broadcast outlets deliver the news almost instantaneously. The latest headlines are available via pagers and cell phones. The words “live,” “local,” and “late-breaking” are now expectations, not innovations.

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who gather and disseminate it, can be classified as instrumentalities of interstate commerce).

<sup>268</sup> See CHEMERINSKY, *supra* note 266, at 261–64.

<sup>269</sup> *Lopez*, 541 U.S. at 559; *see also* Elrod, *supra* note 248, at 169.

<sup>270</sup> *See, e.g.,* Rita Rubin, *Merck Halts Vioxx Sales*, USA TODAY, Oct. 1, 2004, at 1A, available at [http://www.usatoday.com/money/industries/health/drugs/2004-09-30-vioxx-withdrawn\\_x.htm?POE=click-refer](http://www.usatoday.com/money/industries/health/drugs/2004-09-30-vioxx-withdrawn_x.htm?POE=click-refer) (“The news [of the risks of Vioxx] hit Merck’s stock hard. It fell 27% to close at \$33, wiping out \$27 billion in market value.”).

<sup>271</sup> Reuters, *Martha Stewart Stock Takes a Drubbing*, Mar. 4, 2005, <http://www.msnbc.msn.com/id/7091430/> (tracing the ups and downs of Stewart’s stock, which soared when she was imprisoned and just before her release, but has since taken a dive).

Indeed, a lot has changed in the media world since June 29, 1972, and yet *Branzburg*, the decision that came down that day, remains. And so do the problems that the case has created for reporters seeking to keep promises of confidentiality to their sources and to keep important information freely flowing to the public. This flow of information is being impeded by subpoenas compelling disclosure, and the threat—or, in the case of Judith Miller, the grim reality—of jail time for refusing to divulge a source's identity.<sup>272</sup>

Because the Supreme Court seems unwilling to revisit the issue of a journalistic privilege, only Congress can put a stop to the steady stream of reporter subpoenas. By enacting a federal shield statute providing an absolute privilege against compelled disclosure of all sources, Congress would create uniform, nationwide protection for journalists. An absolute shield law, like the Freedom of the Press Act proposed in this Note, would encourage whistleblowers to come forward, would deter press self-censorship, and would allow reporters to fulfill their critical Fourth Estate role—a role that Judith Miller, Jim Taricani, and other journalists like them should not have to go to jail to protect.<sup>273</sup>

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<sup>272</sup> *The New York Times* reportedly incurred millions of dollars in legal fees in the Miller case. Despite the controversy surrounding Miller's decisions throughout her ordeal, *Times* officials do not regret supporting their journalist's decision to go to jail to protect her source. Bill Keller, the paper's executive editor, said, "I hope that people will remember that this institution stood behind a reporter, and the principle, when it wasn't easy to do that, or popular to do that." Van Natta, *supra* note 4. Other journalists voiced concern over Miller's decision to testify in exchange for her freedom, viewing it as a victory for prosecutors and the courts, which they believe will become "bolder and bolder" in pressuring reporters to disclose confidential news sources. See, e.g., Howard Kurtz, *Miller and Her Stand Draw Strong Reactions*, WASH. POST, Oct. 1, 2005, at A4.

<sup>273</sup> On November 9, 2005, Judith Miller retired from *The New York Times*. She plans to continue lobbying Congress to pass a federal reporter shield law. David B. Caruso, *Miller Ends Her Tenure at the Times*, PHILA. INQUIRER, Nov. 10, 2005, at A2.